EDITED BY

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The Oxford Handbook *of* THE THEORY OF INTERNATIONAL LAW

THE OXFORD HANDBOOK OF

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Edited by

ANNE ORFORD

and

FLORIAN HOFFMANN

with

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and William Orford (1930–2015)

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Anne Orford and Florian Hoffmann
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INTRODUCTION

THEORIZING INTERNATIONAL LAW

ANNE ORFORD
AND FLORIAN HOFFMANN

1 The Practice of Theorizing about International Law

Theorizing is an inherent part of the practice of international law. The aim of this *Handbook* is to provide readers with a sense of the diverse projects that have been understood or characterized as exercises in theorizing about international law over the past centuries, explore which aspects of international law have seemed important to theorize about at different times and places, and analyse the uses to which different theories of international law have been put. What do international lawyers think of as theory, and how does it relate to past and present practices of the discipline or the profession? What is the proper relation between theories of international law and other domains of theorizing, such as philosophy, sociology, or history? Should the practice of international law be measured against theories, values, standards, or ideals derived from outside the discipline, or against the values embedded in professional practices, vocabularies, or rhetoric?

Theorizing about international law has of course taken many different forms. During periods in which international law has been at its most precarious, theories of international law have attempted to demonstrate that laws governing the conduct of sovereigns exist at all. At other times, the theory of international law has been concerned with the attempt to connect emerging forms of international

legal practice to a philosophical or historical tradition from which international law is said to originate, or to develop a method for interpreting or systematizing international law. The relation of international law to the modern state has been the focus of much theoretical work, both by those seeking to challenge the state's role as the privileged subject of international law or by those seeking to argue that recognition of its importance and status have been lost. And at moments when the varied projects of international law have been at their most politically contested,[1] international legal theory has been concerned to provide accounts of the underlying justifications for rules of international law, the reasons why international law is or should be binding upon states or other actors, and the relation of international law to values such as justice, peace, dignity, or equality.

Theoretical interest in questions about the concept, nature, function, legitimacy, and orientation of international law has grown markedly over the past decades. Work on the theory of international law is one of the most dynamic and fast-developing fields in contemporary international legal scholarship. Established international law journals now regularly include theoretically focused articles, while new journals have been established to meet the growing demand for venues in which such scholarship can be published. Major societies of international law have active theory interest groups. In addition, there has been a renaissance in publishing in the field of international legal theory. Much of the most exciting new research in international law has been concerned with exploring foundational concepts and questions; developing new intellectual histories of the discipline; thinking in innovative ways about the relation between the theory, history, and practice of international law; or providing fresh interpretations of key figures and traditions in the field.

To some extent the current state of international legal theory should not come as a surprise. As a form of law conceived to represent, constitute, and govern the modern system of territorially based nation-states, international law has always been seen both as a function of the powers that be and as governing those powers

[1] On the projects of international law, see J Crawford and M Koskenniemi, 'Introduction' in J Crawford and M Koskenniemi (eds), *The Cambridge Companion to International Law* (CUP Cambridge 2012) 1–21, at 14–15 (noting that 'Unlike other legal disciplines, international law usually involves a commitment on the part of those who have recourse to it. It is seen as more than just a neutral arbiter between disputing states or other actors but as bearing in itself some blueprint for improving the world, or those aspects of the world where it operates…Christianity, civilisation, modernity, peace, development, self-determination—these are some notions that have been regarded as the gift brought to the world with the expansion of international law's more technical rules and institutions…Because of international law's strong ideological pull, its operation cannot be understood without examining what projects it invites its practitioners to participate in'); A Orford, 'Constituting Order' in *The Cambridge Companion to International Law* (n 1) 271–89, at 272 (noting that international law has been embraced 'as a vehicle for wide-ranging public projects designed to reorder the world, from dividing up Africa at the end of the nineteenth century, to ending the scourge of war, managing decolonisation, humanising warfare and liberalising trade in the twentieth century').

from an independent vantage point. As a result, international law has long been a methodologically unique and theoretically engaged field of law. It articulates a horizontal, rather than vertical, normativity in which there is no universal sovereign. Its traditional sources bind it to the reality of inter-state relations, yet it is also meant to constrain and configure those relations. Dispute resolution in international law inevitably also raises questions about the grounds of jurisdiction and the particular normativity that is to apply in a given situation.

Indeed, despite claims that international law is inherently a practical rather than a theoretical discipline, the practice of international law draws international lawyers into contemplation of some of the core concerns of politics and philosophy, such as the nature and limits of sovereignty, the basis of obligation in international affairs, the concept of responsibility, the relationship of international and domestic order, the rights of war and peace, and the place of the individual in modern political communities. Prior to the nineteenth century, those who are now characterized as the founding fathers of international law tended to be general scholars in the humanist or scholastic traditions, who drew upon a wide array of vocabularies and methods to deduce the law of nations.[2] Theory was at the heart of their practice.

As the profession of international law became more clearly established during the nineteenth and early twentieth centuries, the kinds of theoretical work typically undertaken by international lawyers shifted from the 'grand theory' approach which seeks to understand the role of law in international relations or to grasp the essential nature of international law, to the more technical forms of theorizing involved in applying an increasingly canonical body of well-established rules, principles, and concepts to the conduct of states and other international actors. The positivist and dogmatic traditions that were increasingly felt to be appropriate for an age of democratic states insisted that international law was no longer something that could be assembled from equity, natural law, local custom, judicial precedent, or moral standards by a group of erudite men.[3] Yet those positivist and dogmatic traditions would nonetheless depend for their legitimacy upon their association with (theoretically informed) foundational commitments to scientific reason and the realization of world peace and economic interdependence through law.[4]

[2] See further R Lesaffer, 'Roman Law and the Intellectual History of International Law' in this *Handbook*; M Koskenniemi, 'Transformations of Natural Law: Germany 1648–1815' in this *Handbook*; MJ van Ittersum, 'Hugo Grotius: The Making of a Founding Father of International Law' in this *Handbook*; E Tourme-Jouannet, 'The Critique of Classical Thought during the Interwar Period: Vattel and Van Vollenhoven' in this *Handbook*.

[3] A Carty, *Philosophy of International Law* (Edinburgh University Press Edinburgh 2007) at 2. On positivism and its relationship to democracy, see N Lacey, *A Life of HLA Hart: The Nightmare and the Noble Dream* (OUP Oxford 2004) at 5–6, 225.

[4] See further M García-Salmones, 'Early Twentieth Century Positivism Revisited' in this *Handbook*; J Kammerhofer, 'International Legal Positivism' in this *Handbook*; A Orford, 'Scientific Reason and the Discipline of International Law' (2014) 25 *European Journal of International Law* 369–85.

In the aftermath of the Second World War, however, the discipline of international law began to be dominated by a more avowedly anti-theoretical ethos. That ethos registered across a range of positions, including a pragmatic American tradition that focused on problem-solving as the *telos* of law,[5] an empiricist British tradition that prided itself on rejecting any grand-level or systemic abstractions for an approach based on observation and deduction,[6] and more generally what came to be called the mainstream approach to legal analysis and interpretation that treated law as an objective phenomenon distinct from politics or morality and that starkly reduced the reflective space for theorizing. Within those traditions, the role for theory was at best as an aid to the interpretation and systematization of a body of rules, with questions about the historical pedigree, normative foundations, political implications, or practical consequences of those rules largely being treated as outside the remit of the international lawyer.

Of course, there were always international law scholars who resisted the strong separation of theory and practice, and who continued to reflect upon the nature and relevance of their discipline and its relationship to other forms of law and social transformation. We might think, for example, of the world order theory and policy-oriented vision of international law championed by Myres McDougal and Harold Lasswell at Yale,[7] the transformative work of early post-independence scholars such as RP Anand and TO Elias,[8] or the reflective work of legal advisors to foreign offices or international organizations theorizing about their practice or the character of international law more generally.[9] In the United States (US), legal scholars struggled to articulate a vision of international law that was capable of responding to the transformations that were taking place in the composition and conditions of international society due to the potent combination

[5] See further H Saberi, 'Yale's Policy Science and International Law: Between Legal Formalism and Policy Conceptualism' in this *Handbook*. For an exploration of the theoretical foundations of American pragmatism as it operates in the human rights field, see F Hoffmann, 'Human Rights, the Self and the Other: Reflections on a Pragmatic Theory of Human Rights' in A Orford (ed), *International Law and Its Others* (CUP Cambridge 2006) 221–44; B Golder, 'Theorizing Human Rights' in this *Handbook*.

[6] See the discussion in C Warbrick, 'The Theory of International Law: Is There an English Contribution?' in P Allott et al., *Theory and International Law: An Introduction* (British Institute of International and Comparative Law London 1991) 49–71.

[7] See 'Yale's Policy Science and International Law' (n 5).

[8] RP Anand, 'Rôle of the "New" Asian–African Countries in the Present International Legal Order' (1962) 56 *American Journal of International Law* 383–406; RP Anand, *New States and International Law* (Vikas New Delhi 1972); TO Elias, *Africa and the Development of International Law* (AW Sitjhoff Leiden 1972). See further A Anghie, 'Imperialism and International Legal Theory' in this *Handbook*.

[9] For example O Schachter, 'The Relation of Law, Politics and Action in the United Nations' (1963) 109 *Recueil des Cours* 165–256; R St J MacDonald, 'The Role of the Legal Adviser of Ministries of Foreign Affairs' (1977) 156 *Recueil des Cours* 377–484; P Allott, 'Language, Method and the Nature of International Law' (1971) 45 *British Year Book of International Law* 79–135; P Allott, 'Making the New International Law: Law of the Sea as Law of the Future' (1985) 11 *International Journal* 442–60.

of decolonization, the Cold War, and the emerging self-perception of the US and the USSR as superpowers with moral missions.[10] The Francophone world saw the emergence of an internal debate within positivism, in which the statist tradition of voluntarism was challenged by a universalist conception of international law as a coherent system.[11] Positivist certainties about the autonomy and inherent justice of international law were in turn critiqued by scholars associated with the *École de Reims* as well as Third World advocates for a new international economic order, both of whom accused international law of being Eurocentric and productive of inequality.[12] In Germany, an influential account of international law as oscillating between bilateralism and community interest was developed in the work of Bruno Simma and his colleagues over a number of decades,[13] while a group of Frankfurt school-inspired German and US scholars who would subsequently go on to produce critical analyses of globalization, law and development, and other transnational forms of legal ordering were beginning a fruitful dialogue.[14]

[10] See, from a wide literature, AA Fatouros, 'International Law and the Third World' (1964) 50 *Virginia Law Rev* 783–823; W Friedmann, 'United States Policy and the Crisis of International Law' (1965) 59 *American Journal of International Law* 857–71; R Falk, 'Law, Lawyers, and the Conduct of American Foreign Relations' (1969) 78 *Yale Law Journal* 919–34; PC Jessup, 'Non-Universal International Law' (1973) 12 *Columbia Journal Transnational Law* 415–29. For a more detailed discussion of this literature, see A Orford, 'Moral Internationalism and the Responsibility to Protect' (2013) 24 *European Journal of International Law* 83–108.

[11] For discussions of these debates within French positivism, see E Jouannet, 'Regards sur un siècle de doctrine française du droit international' (2000) 46 *Annuaire Français de Droit International* 1–57; P-M Dupuy, 'L'unité de l'ordre juridique international: cours général de droit international public' (2002) 297 *Recueil des Cours* 1–489.

[12] See eg C Chaumont, 'Cours général de droit international public' (1970) 129 *Recueil des Cours* 333–528; M Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier New York 1979); M Bennouna, *Droit international du développement. Tiers-monde et interpellation du droit international* (Berger-Levrault Paris 1983); M Flory et al., (eds), *La formation des normes en droit international du développement* (CNRS Paris 1984). For an engagement with these critiques, see A Pellet, 'Contre la tyrannie de la ligne droite: aspects de la formation des normes en droit international de l'économie et du développement' (1992) 19 *Thesaurus Acroasium* 291–355.

[13] See B Simma, *Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge* (Duncker & Humblot Berlin 1972); A Verdross and B Simma, *Universelles Völkerrecht: Theorie und Praxis* (3rd edn Duncker & Humblot Berlin 1984); B Simma, 'International Crimes: Injury and Countermeasures' in JHH Weiler, A Cassese, and M Spinedi (eds), *International Crimes of State* (De Gruyter Berlin 1989) 283–316; B Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 *Recueil des Cours* 217–384. For a comparison of the account developed by Simma to that developed in Martti Koskenniemi's *From Apology to Utopia*, see A Carty, 'Critical International Law: Recent Trends in the Theory of International Law' (1991) 2 *European Journal of International Law* 1–27, at 12 (suggesting that the difference between Simma and Koskenniemi 'is one of attitude to, rather than appreciation of, the nature of the phenomenon').

[14] See the papers from the milestone 1986 Bremen conference published in C Joerges and D Trubek (eds), *Critical Legal Theory: An American–German Debate* (Nomos Baden-Baden 1989), and the reflections on the trajectories that led to that event in C Joerges, DM Trubek, and P Zumbansen, '"Critical Legal Thought: An American–German Debate" An Introduction at the Occasion of Its Republication in the *German Law Journal* 25 Years Later' (2011) 12 *German Law Journal* 1–33.

Nonetheless, by the late twentieth century the continued dominance of a disciplinary divide between theory and practice had begun to seem increasingly constraining. Theoretical concerns were raised in mainstream scholarship with a new insistence. The perceived fragmentation of the canonical corpus of international law into distinct legal regimes, operating in an increasingly autonomous and partially incompatible fashion, triggered a new theoretical interest in the systematic and universal character of international law. Constitutionalist thinkers sought to identify emerging normative standards in the field generally, as well as within different regimes such as international trade law, international human rights law, international humanitarian law, and international criminal law. The normative entrepreneurialism and transnational activities of non-state actors fostered a new theoretical engagement with questions about the concept of sovereignty, the proper subjects of international law, and the recognized sources from which international law derived. The perennial problem of compliance continued to inspire theoretical reflection on the nature of statehood, normativity, and legal governance. Institutional and political developments following the end of the Cold War led to a revival of interest in cosmopolitanism. Many scholars in law and the humanities embraced a cosmopolitan vision of the future of international law in answer to the sense of crisis precipitated by events such as the war on terror, climate change, and the global financial crisis. They have envisaged new forms of international law capable of representing a common humanity.

In addition, a new genre of critical scholarship that emerged in the post-Cold War period began to enliven and provoke impassioned debates about the proper relation between theory and practice in international law. A series of ground-breaking texts were published in English in the late 1980s and early 1990s, giving a new energy to theoretical work in the field. They included *The Decay of International Law* by Anthony Carty, *International Legal Structures* by David Kennedy, *From Apology to Utopia* by Martti Koskenniemi, *Eunomia* by Philip Allott, 'Feminist Approaches to International Law' by Hilary Charlesworth, Christine Chinkin, and Shelley Wright, and *International Law and World Order* by BS Chimni.[15] Each of those texts registered a disenchantment with contemporary representations or self-understandings of international law, and a willingness to draw overtly on ideas and influences from 'outside' the field as a means for disciplinary renewal

[15] A Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press Manchester 1986); D Kennedy, *International Legal Structures* (Nomos Baden-Baden 1987); M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Finnish Lawyers' Publishing Helsinki 1989); P Allott, *Eunomia* (OUP Oxford 1990); H Charlesworth, C Chinkin, and S Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613–45; BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (Sage New York 1993). On the contributions of feminist and Marxist theorizing, see further D Otto, 'Feminist Approaches to International Law' in this *Handbook* and R Knox, 'Marxist Approaches to International Law' in this *Handbook*.

and innovation. Each of those texts resisted the idea that international law was in some strong sense self-contained and distinct from morality, politics, economics, or culture. And each of those texts stood apart from, and indeed in opposition to, the policy-oriented or ideologically committed theories of earlier reformist scholarship in international law. They inspired a new generation of scholars and scholarship overtly concerned with critically theorizing about international law with a view to its transformation.

2 The Challenges of the Turn to Theory

While the rapid growth of new theoretical scholarship enriched and enlivened the field of international law, it also brought with it new challenges, most notably in the realm of methodology where questions concerning disciplinary integrity and epistemic authority have loomed large. This *Handbook* offers a response to four of the challenges caused by the rapid expansion in the production of theory.

The first such challenge involves the relation of theory and practice. Some scholars have responded to the 'turn to theory' in international law by calling for a more systematic approach to theorizing, ideally to be undertaken by specialists trained in jurisprudence or philosophy. While the idea of a more specialized and less amateurish approach to theorizing may seem appealing, the danger that this represents for international law (as for other disciplines) is that the vital sense of an inherent interrelationship between the history, theory, and practice of the discipline is lost. A similar tendency to separate history, theory, and practice marked the professionalization of many fields during the twentieth century, amongst them the hard sciences, economics, and even history.[16] Examples include the failed attempts in the US to create a philosophy of science that would be in active collaboration with scientists and the practice of science after the Second World War,[17] the abandonment by mainstream economic thinking of a commitment to reflecting critically upon the relation between its history, concepts, and practice,[18] or the tendency for

[16] See A Orford, 'International Law and the Limits of History' in W Werner, A Galan, and M de Hoon (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (CUP Cambridge forthcoming).

[17] GA Reisch, *How the Cold War Transformed Philosophy of Science: To the Icy Slopes of Logic* (CUP Cambridge 2005).

[18] See further the arguments in K Tribe, *Land, Labour and Economic Discourse* (Routledge London 1978); GM Hodgson, *How Economics Forgot History* (Routledge London 2001); L Magnusson, *The Tradition of Free Trade* (Routledge London 2004).

historians to forget the historically contingent and deeply political nature of the myths and methods at the heart of their practice.[19] As those examples illustrate, once the history and philosophy of a discipline are abstracted and treated as distinct from its practice, a politically engaged vision of that practice is much harder to realize. Work in each sphere—history, theory, and practice—can proliferate endlessly, with an increasing number of highly technical studies being produced but with a decreasing sense of their relevance for political engagement in the world. The *Handbook* thus seeks to resist the tendency for international legal theory to become a new self-enclosed area of specialization.

A second and related challenge results from the question of what the proper methodological approach to theorizing about international law should be. Here the chapters of this *Handbook* articulate a set of interrelated concerns. Some authors see international law theorizing as amateurish, prone to haphazard borrowing and to attributing epistemic authority to concepts and debates forged outside of its own practice without reflection on their specific disciplinary trajectories or, indeed, on the methodological challenges of such theory transplantation.[20] Other authors implicitly or explicitly reject the assumption that theorists of international law should simply follow the protocols, methods, values, and questions developed in other disciplines, and instead model the ways in which theorists of international law might address and comprehend legal practice as a source of values and epistemic standards.[21] Those authors suggest that it is neither inevitable nor desirable that a turn to theory or engagement in interdisciplinary work by international law scholars should lead to the displacement of the concepts, methods, practices, and experiential life of the discipline itself. While the measure or meaning of international law can of course be understood in part through such interdisciplinary encounters, for many of the *Handbook* authors this is seen to require a commitment to the integration of history, theory, and practice.

A third challenge that may arise from the development of a more specialized approach to theorizing in a normatively oriented field such as international law is that the resulting theories may come to be treated as embodying timeless truths. That tendency is intensified in legal scholarship, where lawyers often treat theorists in the way we have been trained to treat other generators of norms, such as judges or legislatures.[22] The pronouncements of philosophers are thus deployed as

[19] C Fasolt, *The Limits of History* (University of Chicago Press Chicago 2004).

[20] See S Besson, 'Moral Philosophy and International Law' in this *Handbook*; 'International Legal Positivism' (n 4); D Danielsen, 'International Law and Economics: Letting Go of the "Normal" in Pursuit of an Ever-Elusive Real' in this *Handbook*.

[21] See eg D Kritsiotis, 'Theorizing International Law on Force and Intervention' in this *Handbook*; S Nouwen, 'International Criminal Law: Theory All Over the Place' in this *Handbook*; F Johns, 'Theorizing the Corporation in International Law' in this *Handbook*; K Rittich, 'Theorizing International Law and Development' in this *Handbook*.

[22] P Schlag, 'A Brief Survey of Deconstruction' (2005) 27 *Cardozo Law Review* 741–52.

authority for the meaning and demands of justice universally, and yet embedded in theoretical pronouncements about justice or power or resistance are particular unarticulated assumptions about the political situation in which justice or power or resistance are understood to be operating.[23] For lawyers seeking to take responsibility for engaging with the practice of the discipline and for its present politics, it is useful to grasp the practice of theorizing as itself historically situated and existing in relation to particular concrete situations.

A final related challenge that has come with the rapid expansion of theoretical work in international law is the difficulty it poses for those seeking to engage with that work for the first time. A central feature of contemporary international law theory remains its methodological plurality. International legal theorists have largely favoured methodological *bricolage*, drawing on a range of disciplines and vocabularies in order to construct specific arguments rather than to build grand theory. This has been intensified by the global nature of international legal scholarship, with different thematic concerns and jurisprudential trends often taking hold in different countries. In addition, the globalized marketplace of ideas often—and paradoxically—produces centralization: one way for consumers to address the proliferation of commodities is to make choices based on brands. Something similar seems to function in the world of legal theory, where the globalization of international law scholarship and the creation of highly networked global communities seems to have reduced rather than pluralized the field. One or two scholars, and even in some cases one or two articles or axioms, are treated as standing in for 'critical approaches' or 'philosophical approaches' or even the theory of international law in general. Providing an opening to the richness and diversity of the field is thus an important spur to the writing of this *Handbook*.

3 Ways of Theorizing International Law

The aim of this *Handbook* is then to provide a much-needed map of the different traditions and approaches that shape contemporary international legal theory and a guide to the main themes and debates that have driven theoretical work in the field. The authors take quite different approaches to their task: some offer a systemization, others an intellectual or contextualist history, others a critical or normative

[23] A Orford, 'In Praise of Description' (2012) 25 *Leiden Journal of International Law* 609–25.

evaluation, and still others a performance of an approach or style. Their chapters are arranged in four parts, organized around the themes of histories (Part I), approaches (Part II), doctrines and regimes (Part III), and debates (Part IV).

The underlying aim of Part I (Histories) is to create a methodological awareness of the historical dimension of international legal theory. The chapters introduce some of the key theories and thinkers that have been treated as providing the foundations of international legal theory, and explore the ways in which international legal theory has developed within broader intellectual and political contexts. History figures in these chapters in a variety of ways. First, the nature of the relation between theory and history, or the 'turn to history' as a theoretical move, is foregrounded. The historical consciousness and temporal concepts of progress, development, or civilization embedded within international law are explored as central to the self-constitution of the discipline,[24] and as bound up with its projects of imperial expansion and modernist reform.[25]

In addition, the chapters in this Part take seriously what seems at first a banal observation—that international law and the theory of international law are different in different times and places. All the chapters in this Part pay close attention to the interventions that particular theories make and the context in which they were first presented. A number of the authors draw our attention to aspects of that context that have since been forgotten and that serve as a reminder of the initial potency of theories or texts that has been diminished over time.[26] Theory appears here, in the words of Deborah Whitehall, as 'a call to action put to the international legal order' at moments of great opportunity. Other chapters are interested in exploring what happens when the work of a theorist is taken up in another time and place, seeking to provide historical correction to received readings or posing questions about the grounds on which we approve of some uses of theory or readings of theorists and not others.[27] Overall the chapters in Part I offer a sweeping overview of what counts as 'theory' (and what, for that matter, counts as 'international' or 'law') in different historical situations. The resulting analyses suggest strongly that theorizing about international law is not a linear process, but rather that concepts, values, and ideals that seem to have exhausted their potential

[24] M Craven, 'Theorizing the Turn to History in International Law' in this *Handbook*.

[25] U Özsu, 'The Ottoman Empire, the Origins of Extraterritoriality, and International Legal Theory' in this *Handbook*; T Ruskola, 'China in the Age of the World Picture' in this *Handbook*; 'Imperialism and International Legal Theory' (n 8).

[26] 'Roman Law and the Intellectual History of International Law' (n 2); 'Transformations of Natural Law' (n 2); 'Early Twentieth-Century Positivism Revisited' (n 4); J von Bernstorff, 'Hans Kelsen and the Return of Universalism' in this *Handbook*; D Whitehall, 'Hannah Arendt and International Law' in this *Handbook*.

[27] See eg 'Hugo Grotius: The Making of a Founding Father of International Law' (n 2); 'The Critique of Classical Thought during the Interwar Period' (n 2); R Howse, 'Schmitt, Schmitteanism and Contemporary International Legal Theory' in this *Handbook*.

may suddenly reappear, generations later, to do quite different work in quite different settings.[28]

In a broader sense, history also figures in these chapters as a spur to the discussion of questions about method—questions such as the status attributed to historical reconstruction and historiographic method in contemporary international law theorizing more generally, whether there is a 'correct' use of a theorist or a theory, and what constitutes the context within which we might make sense of a particular theoretical contribution. Indeed, many of the themes and modes of inquiry that recur in discussions throughout the *Handbook* have roots in historiography, such as the question of origins, of revisionism, of disciplinary mythologizing, and the role of iconic and intellectual father— and mother—figures in creating invented traditions for the field. In that sense, Part I introduces the more general approach that is taken up throughout the *Handbook*, in offering a genealogy of theory that is both historical and critical.

The chapters comprising Part II (Approaches) reflect some of the different ways in which a general taxonomy of the theory field can be envisaged. To thematize 'approaches' means to engage with disciplinary identities, whether by constructing more or less coherent historical narratives, or by producing semantic unity through differentiation, notably through the pinpointing of dichotomies or contrasts deemed to be constitutive of theoretical discourse. This Part does not purport to offer an encyclopaedic overview of all the different modes in which international legal theory is undertaken today, but rather produces something resembling a 'tag-cloud' of key recurring terms that inform contemporary theorizing. As it turns out, this cloud is not an indiscriminate assemblage of concepts, but reveals a range of different ways of categorizing approaches.

There is, in the first place, a recurrent engagement with the traditional mode of classification, notably by reference to a limited set of master narratives or 'schools of thought' deemed to have shaped the theory landscape. Despite, or indeed because of, the discipline-wide familiarity (or overfamiliarity) of these 'schools',[29] no uniform picture emerges, but rather a kaleidoscopic image of partly overlapping, partly contrasting vocabularies employed to articulate the concept of international law. Hence, the commonly recognized jurisprudential grand *écoles* of positivism,[30] natural law,[31] and realism[32] turn out to be but shards from history that provide starting and breaking points for much more complex and differentiated narratives about what law in the international sphere is and how it works.

[28] See eg L Mälksoo, 'International Legal Theory in Russia: A Civilizational Perspective' in this *Handbook*.

[29] See further D Joyce, 'Liberal Internationalism' in this *Handbook*.

[30] 'International Legal Positivism' (n 4).

[31] G Gordon, 'Natural Law in International Legal Theory: Linear and Dialectical Presentations' in this *Handbook*.

[32] O Jütersonke, 'Realist Approaches to International Law' in this *Handbook*.

They are complemented by a dichotomy that defines not just legal theorizing but Western political thought itself, notably liberalism and Marxism,[33] and the distinct approaches to the ontology (agency-orientation versus structuralism) and epistemology (historicism versus historical materialism) of international law they represent—with liberalism being the constitutive master narrative of the international legal project as it has been known so far. There are further currents that either provide the discursive 'conditions of possibility' for these grand 'schools', such as the universe of humanist thought and the 'semiogenesis' of international legality,[34] or that graft new vocabularies onto the older schemes and reinterpret their dichotomies, such as those of the Yale,[35] Global Administrative Law,[36] Law and Economic Analysis,[37] or Feminist Theory 'schools'.[38] Lastly, there is an engagement with some of the significant others of these 'schools', most notably with international law's disciplinary nemesis, international relations,[39] and with normative political philosophy,[40] its constant if uneasy companion.

In all, the styles and outlooks of this Part reflect the spirit of the times. An increasingly erudite if decidedly 'small-caps' ideology-critique largely based on historical mapping rather than on original argument defines the tone of contemporary theorizing. There is a somewhat resigned recognition of an ever increasing complexity and theoretical diversity, an honest attempt to shed light on the blind spots of one's own perspective, a commitment to non-parochialism, an all pervasive endeavour to link theory to practice, and a search for ways to practice theory. Yet, what arguably makes this approach to approaches distinct from the stylized disinterestedness of other disciplinary frameworks such as (some of) international relations or political science is the passionate quest, recurrent in many a chapter in this Part, for the possibility of positive change or—put simply—a 'better world'. That quest is well captured by Dianne Otto, who does not shy away from naming her fundamental motivation as the search for a 'more egalitarian, inclusive, peaceful, just and redistributive international order'.[41]

Part III (Doctrines and Regimes) provides an overview of theoretical discussions relating to core doctrines and areas of contemporary international law, exploring the role of theory in relation to canonical subjects of general international law, such as sources, statehood, state responsibility, and jurisdiction, as well as theories relating to

[33] 'Liberal Internationalism' (n 29) and 'Marxist Approaches to International Law' (n 15).

[34] See P Goodrich, 'The International Signs Law' in this *Handbook*.

[35] See 'Yale's Policy Science and International Law' (n 5).

[36] See B Kingsbury, M Donaldson, and R Vallejo, 'Global Administrative Law and Deliberative Democracy' in this *Handbook*.

[37] See 'International Law and Economics' (n 20).

[38] See 'Feminist Approaches to International Law' (n 15).

[39] See F dos Reis and O Kessler, 'Constructivism and the Politics of International Law' in this *Handbook*.

[40] 'Moral Philosophy and International Law' (n 20).

[41] 'Feminist Approaches to International Law' (n 15).

significant specialized regimes, such as international criminal law, international humanitarian law, international human rights law, international environmental law, and international trade law. These chapters give a sense of how lawyers theorize on the run, in response to particular problems or doctrinal dead-ends, and yet in doing so often come back to shared themes or conceptual dilemmas.[42] Many of the regimes explored here are organized around their own invented traditions,[43] in which historical figures, events, and texts are invoked to situate current disciplinary practices within a longer progress narrative. A number of these chapters thus engage with or seek to resist these invented traditions, offering new accounts of the ways in which scholars have drawn on past texts, events, and concepts to consolidate particular theories and traditions that persist through time.[44]

Many of the chapters in this Part comment on the lack of 'overt' theorizing that takes place in relation to specialized doctrines or regimes, and yet find, in the words of Sarah Nouwen, that theory is nonetheless 'all over the place'. Fields that appear to be practitioner-driven and problem-focused, such as law and development,[45] international humanitarian law,[46] or international criminal law,[47] turn out in fact to be premised upon unarticulated theories, while some fields are so dependent upon the theories that structure their operations, such as functionalism in the case of international organizations,[48] pragmatism in the case of human rights,[49] or romanticism born of imperialism in the case of international environmental law,[50] that their foundational premises go unexamined. Core questions about the nature of legal obligation and the status accorded to different subjects drive theorizing across these chapters, informing debates about the contemporary sources of international law,[51] which actors are bound by legal obligations or held to exercise responsibility in particular fields,[52] the criteria according to which the subjects of international law should be recognized,[53] and the relation between public and

[42] J Klabbers, 'Theorizing International Organizations' in this *Handbook*; 'Theorizing the Corporation in International Law' (n 21); C Thomas, 'Transnational Migration, Globalization, and Governance: Theorizing a Crisis' in this *Handbook*.

[43] On the role of invented traditions in legitimizing contemporary practices and institutions more generally, see E Hobsbawm and T Ranger (eds), *The Invention of Tradition* (CUP Cambridge 1983).

[44] A Orford, 'Theorizing Free Trade' in this *Handbook*; S Humphreys and Y Otomo, 'Theorizing International Environmental Law' in this *Handbook*; 'Theorizing the Corporation in International Law' (n 21); V Nesiah, 'Theories of Transitional Justice: Cashing in the Blue Chips' in this *Handbook*.

[45] 'Theorizing International Law and Development' (n 21).

[46] F Mégret, 'Theorizing the Laws of War' in this *Handbook*.

[47] 'International Criminal Law: Theory All Over the Place' (n 21).

[48] 'Theorizing International Organizations' (n 42).

[49] 'Theorizing Human Rights' (n 5).

[50] 'Theorizing International Environmental Law' (n 44).

[51] J d'Aspremont, 'Towards a New Theory of Sources in International Law' in this *Handbook*.

[52] G Noll, 'Theorizing Jurisdiction' in this *Handbook*; O Korhonen and T Selkälä, 'Theorizing Responsibility' in this *Handbook*.

[53] G Simpson, 'Something to Do with States' in this *Handbook*; R Parfitt, 'Theorizing Recognition and International Personality' in this *Handbook*.

private actors and domains.[54] A number of the chapters register the ways in which the contemporary crisis of the state has driven a rethinking of the very nature and grounds of international law, whether that be a result of the crisis of the security state in Britain and the US which can no longer rely upon the secrecy of its military and intelligence operations,[55] or the crisis of the neoliberal state form which has been constituted in part through the increasingly undemocratic project of global economic integration.[56] A key theme that recurs throughout this Part is the vital connection between practical innovation, theoretical elaboration, and social transformation, both in relation to the political instrumentalization of theory in practice and in the search for a critical practice of international law in its different articulations.

Part IV (Debates) presents some of the most existential and essential questions informing the discipline's current state and likely future. Those debates represent a set of cross-cutting concerns that arise out of a number of broad phenomena with which all contemporary students and practitioners of international law are confronted. What makes them into debates is the fact that they are both ongoing and unsettled: they are, to apply a Kuhnian metaphor, in that 'revolutionary' state in which old epistemic certainties have been diluted but new certainties have yet to become hegemonic. It is that precious state in which no one is right but everyone can claim to be, and it is for this reason that they reveal much about the deeper state(s) of contemporary international law theory.

Three key themes emerge from the chapters in this section. First, a number of specific issues appear as catalysts for wider engagements with some of the open questions of the discipline. These relate to the modes by which international law is deemed to function or to fail to function, and to the desirable or undesirable outcomes of international legal process. They include religion as one of the conceptual staging grounds of the international legal project,[57] sovereign equality and democracy as perennial utopias of an imaginary international society,[58] and (Third World) poverty as, potentially, part of the very genetic programming of international law.[59] There are also concepts that seek to articulate and problematize particular movements or dynamics within international law as a whole, notably its much-worried-about fragmentation,[60] and the question of its directionality as epitomized in the idea of progress.[61]

[54] H Muir Watt, 'Theorizing Private International Law' in this *Handbook*; 'Theorizing the Corporation in International Law' (n 21).

[55] 'Theorizing International Law on Force and Intervention' (n 21). See also *Philosophy of International Law* (n 3) 14–18.

[56] 'Theorizing Free Trade' (n 44); 'Transnational Migration, Globalization, and Governance' (n 42).

[57] R Paz, 'Religion, Secularism, and International Law' in this *Handbook*.

[58] T Skouteris, 'The Idea of Progress' in this *Handbook*; A Peters, 'Fragmentation and Constitutionalization' in this *Handbook*.

[59] J Beckett, 'Creating Poverty' in this *Handbook*.

[60] 'Fragmentation and Constitutionalization' (n 58).

[61] 'The Idea of Progress' (n 58).

Second, there are a variety of 'isms' which have been coined to denote both frameworks of thought and militant stances towards them, and which function as 'essentially contested concepts' of the theory of international law. They are often applied with critical intent and, therefore, tend to generate forceful reactions by the recipients of the label. Two of the arguably most contentious 'isms' concern international 'humanitarianism' as the motivation behind much of the recent expansion of international legality,[62] and 'managerialism', a term used both to denote the technocratization and de-politicization of international legal practice and the attitude attributed to the legal mainstream.[63] On a more structural level, there is 'liberalism' as the system of thought out of which modern international law has emerged,[64] as well as 'legalism',[65] and 'constitutionalism',[66] which denote attendant programs that underwrite many aspects of contemporary international legal doctrine.

Third, there are a set of overarching or meta-themes which come up in virtually all chapters in this section—and, in fact, in this *Handbook*—and which represent the deepest and most existential layer of questions surrounding the international legal project. They address issues of ontology and epistemology not just of (international) law but of the social sciences and, indeed, knowledge as such. As a result, they are rarely discussed openly within legal texts, though they provide fundamental clues to understanding the different positions, theoretical frameworks, and practical attitudes within international legal discourse. One concerns the differential identity of law vis-à-vis other epistemes, most importantly politics, but also the social and the economic. Closely related to this is the question of autonomy: that is, the extent to which international law is deemed to be autonomous and thus clearly distinct from other social systems, or, conversely, whether it is deemed to be merely epiphenomenal in relation to these other systems, a mere function of, say, politics or the economy. There is also the persistent tension between diversity and unity, be it in relation to individuals and states or different laws and institutions. On a yet more abstract level there lurks the spectre of ideology and its critique, which engages questions of (false) consciousness and emancipation, and which is, perhaps, the most protracted debate in which the different sides of the theoretical spectrum are involved. Finally, there seems to be a sense of and engagement with crisis, be it of specific theories, of the state of theorizing, of the profession, of international law in general and the international rule of law in particular, of modernity, or of 'the world as we know it'. It is quite

[62] 'Religion, Secularism, and International Law' (n 57); 'Creating Poverty' (n 59).

[63] F Hoffmann, 'International Legalism and International Politics' in this *Handbook*; 'Fragmentation and Constitutionalization' (n 58).

[64] See 'Liberal Internationalism' (n 29).

[65] 'International Legalism and International Politics' (n 63).

[66] 'Fragmentation and Constitutionalization' (n 58).

all-pervasive though not generally pessimistic in tone, speaking rather of a critical consciousness, of counterdisciplinary thinking, of contextualization and complexification, and of a critical professional ethos.

4 Conclusion

There are, finally, a number of themes that reappear across all four Parts of the *Handbook*. On the one hand, there are some iconic names (or totems) that function as a form of historical deep structure that few theorists, whether apologetic or critical, are able or willing to ignore. On the other hand, there are certain key concepts around which much theoretical engagement with international law is constructed. In terms of the former, the position of conceptual demiurge is still occupied by Kant, who seems to provide the horizon for many contemporary re-interpretations of international law as a normative or political project. This Kantian predominance says more about the state of contemporary theorizing—whether in its focus on the hegemony of liberalism or on ways to reconstruct critical reason within a globalized international reality—than about the actual Kantian legacy. Accordingly, concepts such as cosmopolitanism, democracy, justice, legitimacy, the rule of law, and the state loom large throughout the *Handbook*, with different Kantian interpretations being used both in justification of mainstream liberal international law and as a critical vocabulary engendering alternative visions.[67]

Other figures recurrently appear, though more eclectically, including Hobbes, and the echelons of classical international law from the Salamancans to Vattel, Grotius, and Pufendorf. Marx, and his international legal interpreter Pashukanis, enters as an irritation on the sidelines, as does a stylized and (almost) personalized nineteenth century, alongside the well-known twentieth century debates and debaters, notably Lauterpacht and Morgenthau, Kelsen and Hart, Schmitt, Arendt, and McDougal. Interestingly, those figures function more as signposts along the road of legal ideas than as authoritative providers of vocabularies and agendas, which may well be in keeping with the general trend to iconoclasm in the contemporary period. Hence, the issues that recur may owe their pedigree, problem-set, or imaginary to the (canonical) icons, but their use transcends and partly contradicts their historical legacy. Some of these key concepts speak to the perennial question of (re-)describing the empirical substances of international

[67] On the cosmopolitan legacy, see W Werner and G Gordon, 'Kant, Cosmopolitanism, and International Law' in this *Handbook*.

law, such as the rule of law, sovereignty, jurisdiction, statehood, responsibility, society, the (Third) world, global values, inter-state power, professional ethos, or governance. Others thematize perspectives and intellectual matrices, often in dichotomous pairs, that structure international legal theorizing, such as the dualities between idealism and pragmatism/realism, classical and modern, moderate and radical, and public and private.

In the end, this *Handbook* does not aim to project an artificial sense of coherence onto the diverse field of international legal theory or to construct a new canonical set of authors and doctrines. Instead, we hope it conveys a sense of the theory of international law as a wide-ranging tradition that is dynamic, pluralist, and politically engaged. By historically situating the thinkers, approaches, debates, methods, experiments, critiques, or problems that have shaped theorizing about international law, the chapters show that theorizing is itself a political intervention. In so doing, these chapters make clearer the stakes—whether political, analytical, institutional, or communicative—involved in taking up the theories we use to think about and through international law.

PART I

HISTORIES

CHAPTER 1

THEORIZING THE TURN TO HISTORY IN INTERNATIONAL LAW

MATTHEW CRAVEN

> The historical trait should not be founded on a philosophy of history, but dismantled, beginning with the things it produced.[1]

1 Introduction

It is a commonplace that the past two decades have been marked by a resurgence of interest in the history of international law.[2] Whether or not this may warrant the grandiose title of a 'turn to history', it is a departure which might prompt a certain level of theoretical reflection: why this sudden interest in the historical at the expense of other forms of analytical or critical endeavours? What might the causes be? What

[1] M Foucault, 'Nietzsche, Genealogy, History' in P Rabinow (ed), *The Foucault Reader* (Pantheon Books New York 1984) 76–100, at 93.

[2] See eg M Koskenniemi, 'Why History of International Law Today?' (2004) 4 *Rechtsgeschichte* 61–6, at 61; A Kemmerer, 'The Turning Aside: On International Law and its History' in RA Miller and RM Bratspies (eds), *Progress in International Law* (Martinus Nijhoff Leiden 2008) 71–93, at 71; T Skouteris, 'Engaging History in International Law' in J Beneyto and D Kennedy (eds), *New Approaches to International Law* (TMC Asser Press The Hague 2012) 99–122, at 103; G Galindo, 'Martti Koskenniemi and the Historiographical Turn in International Law' (2005) 16 *European Journal of International Law* 539–59, at 539.

theoretical or intellectual frames have opened up that were not otherwise available? How might it relate to the themes, interests, or preoccupations of mainstream international legal thought up until that time? Whilst these are undoubtedly interesting and important questions, they pose, in turn, two more general questions as to the relationship between theory and history in international legal discourse. One of these, of course, concerns the theoretical and methodological conditions underpinning the representation of something as the past of international law: what is the relationship between the text and the past? How might one understand the act of 'representation'? What kind of international law is being represented? If such questions are concerned with placing 'history' within the ambit of theory, it is also clear that one must attend to the historical (and spatial!) specificity of the theoretical and methodological analytics through which that history is enunciated or disclosed.[3] What serves as 'history' at any one moment—including its boundaries and conditions—also has its historical place.

With such thoughts in mind, I want to try to do two things in this chapter. In the first place, I intend to look back beyond the immediate causes and explanations of the recent turn to history, and focus instead upon their more general conditions of possibility: what was required in order for the productive representation of the past of international law as 'history' to be a meaningful activity? This might appear a somewhat abstruse question were it not for the fact that one may specify with considerable precision the moment at which the law of nations was to acquire an historical hue, requiring its discourse and practice to be organized in temporal terms, and its past 'found' or 'uncovered'. The significance of this, I argue, is not merely confined to an acknowledgement that publicists and jurists suddenly became interested in the past in a way that wasn't apparent before, but that this historical consciousness fundamentally reshaped the conceptualization of what was to become known as 'international law', and placed at centre-stage the problem of historical method. In the second place, and following from this, I want to suggest that not only did the emergence of this historical consciousness have specifiable theoretical and practical dimensions, but that it would become, as Foucault puts it, a 'privileged and dangerous' site, both providing theoretical sustenance to the discipline, and a space for critical engagement. I will conclude with certain reflections upon problems of method associated with contemporary critical international legal history.

2 Turning to History

1795. Robert Plummer Ward, a British author and politician publishes, with encouragement from Lord Stowell,[4] what he proclaims to be the first history of

[3] M De Certeau, *The Writing of History* (Columbia University Press New York 1988) at 20.

[4] Then a judge at the Consistory Court and Advocate-General, later additionally appointed judge at the High Court of Admiralty.

the law of nations ever written: *An Enquiry into the Foundation and History of the Law of Nations*.[5] His claim may be doubted, given the earlier accounts provided by Ompteda in 1785[6] and Moser in 1764,[7] as well as, in the same year, by de Martens.[8] But there is little doubt that there was something inaugural about this late eighteenth-century moment in the sense that from that time onwards all international lawyers were compelled to conceive of their subject matter as 'being in time' and as possessed of 'a history'. Not only would the historical account become an important literary genre in the nineteenth century (from Wheaton through to Nys),[9] but every general textbook on the subject of international law would, almost by compulsion, begin with an historical account of one form or another. And to a large extent, this remains the model to this day.

Ward's account itself is revealing enough in terms of the consequences of this turn to history. He makes clear in the preface to the book, that it had not been his original intention to write a book on the history of the law of nations, but rather a treatise on diplomatic law—an account of sovereignty and of the rights and privileges of ambassadors.[10] Having collected the relevant materials, he tells us, he was then prompted to ask himself as to the conditions 'under which we conceive ourselves bound to obey a law, *independent* of those resources which the law itself provides for its own enforcement'.[11] And at this point, the limits of his original project soon became clear. The received answer to this question, as he understood it, was to be found in the Law of Nature, the content of which was to be found in the universal injunctions of 'heart and natural conscience'. Yet, to him, this was unsatisfactory:

> [w]hen I considered how difficult it was *for the whole of mankind* to arrive at the *same* ideas of moral good, from the prejudices of education and habit, in the different stages of society in which they might be; more particularly when I recollected the great difference of opinion there was among very learned men, of the same nations and ages, and who had the same sort of education concerning the Law of Nature itself; I was still more staggered in my belief that *all* the world were bound to obey the ramified and definite scheme of duties called the Law of Nations.[12]

He continued by observing that:

> although I myself could make out the obligation of the Law of Nations as laid down in the *European* Codes, and that others of the same class of nations, and the same religion with

[5] R Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe* (Butterworth London 1795).

[6] D Ompteda, *Literatur des gesamtennatürlichen und positive Völkerrechts* (Scientia Verlag 1785).

[7] F Moser, *Beyträge zu dem Staats und Völker-Recht und der Geschichte* (JC Gebhard Frankfurt 1764).

[8] GF de Martens, *Summary of the Law of Nations* (W Cobbett trans) (Thomas Bradford Philadelphia 1795).

[9] H Wheaton, *History of the Law of Nations in Europe and America* (Gould Banks New York 1842); E Nys, *Les origines du droit international* (Castaigne Brussels 1893).

[10] *An Enquiry* (n 5) iii–iv. [11] Ibid 5. [12] Ibid 8–9.

myself, could, and were bound to do so too; yet that the law was not obligatory upon persons who had never been called upon to decide upon its ramifications; who might widely differ as to its application, and even as to its general and fundamental principles. The history of mankind confirmed to me that there was such a difference in almost all its extent; that men had the most opposite opinions of their duties towards one another, if not in the great outline and first principles of those duties, yet most certainly in the application of them; and that this was occasioned by the varieties of religion and the moral systems which governed them, operated upon also by important local circumstances which are often of such consequence in their direction.[13]

It was, thus, no longer plausible for him to write a treatise on diplomatic law of universal application. Rather, his attention was drawn towards writing a 'history of the people of Europe', not in the 'old' sense as he puts it of enquiring into their general manners, customs, politics, arts, or feats of arms, but in order to discern the maxims which governed their intercourse with one another. It was to be a history, in other words, of a distinctively European law of nations.

Leaving aside, for a moment, the operative conditions under which this historicised account of the law of nations was to emerge, three general features of Ward's enquiry stand out. In the first place, it is notable that his turn to history did not arrive as a consequence of his scepticism towards the universal claims of natural right, but rather the other way round. It was, in part at least, historical enquiry that had led Ward to a position of incredulity in respect of the universal pretensions of natural law (his thesis, as he put it, was 'proved by history').[14] The natural law he encountered was not in its own right alien to him (nor indeed irrelevant), but it was his experience of his own historical subjectivity that led him to the realization that its prescriptions could not be understood as the *ratio scripta* of a singular divine being or of a universal rational consciousness. Rather they appeared to him as moral and religious injunctions specified by time and place, engendered in particular through education and moral learning. If 'being in time', however, was an existential condition that gave expression to Ward's sense of his own 'European' identity (an 'occidental prejudice' as Nietzsche put it),[15] it was also the mode through which that self-knowledge could be both unearthed and transmitted. The search for the 'origins' or 'foundations' of the law of nations thus would not only reveal its point of justification and temporal dispersion, but would also provide active content of what it meant (for Ward) to be a 'modern' European in the late eighteenth century. History, in other words, was not just shaped by, but a means of making intelligible, the social or national contexts within which it was to be produced.

In the second place, and as a consequence of this, Ward's understanding of his own historical condition was one that had not only temporal, but also decisively

[13] *An Enquiry* (n 5) 11–12. [14] Ibid 15.

[15] F Nietzsche, 'On the Uses and Disadvantages of History for Life' in *Untimely Meditations* (D Breazeale ed RJ Hollingdale trans) (CUP Cambridge 1997) 57–124, at 66.

spatial, connotations. If his experience of history was one that positioned at its centre, the place of human agency in the propagation and dissemination of religious, moral and legal insight (and which, furthermore, understood human agency to be the active product of that process), it was one that had as its complement a spatial differentiation between the cultural field within which this was to take place (Europe), and that which demarcated the space in which different religious, moral, or legal insights might hold (non-Europe). Yet the temporal and spatial articulations were related in a more fundamental way. These were not separate modes of analysis, but were analytically of the same register—the distinction between Europe and non-Europe being of the same character as the distinction between the present of Europe and its own past. As he was to put it, they are all 'foreign countries'.

In the third place, Ward was conscious that the writing of history was ultimately an interpretive activity governed by the 'bent of mind' of the historian in bringing understanding to bear on what might otherwise be a 'dry series of events'. '[H]istory may be compared' he suggests, continuing his spatial theme, 'to a vast and diversified country, which gives very different sorts of pleasure to different travellers, or to the same traveller if he visits it at different times'.[16] Thus, from the same facts, he suggests 'one has drawn a history of man; another, of the progress of society; a third, of the effects of climate; a fourth, of military achievements; a fifth, of laws in general; a sixth, of the laws of a particular state'.[17] The 'past' for Ward, in other words, was a vast, heterogeneous, field of experience within which one could identify a range of different historical lineaments dependent upon the field of study with which one is engaged. And his particular project was one of bringing into view a history proper to the law of nations itself, with its own temporality, chronology, and moments of continuity and change. If, for Ward, this was a chronology that began in Rome and ended with Grotius[18] (after which not much happened, apparently), it was a chronology conditioned by an ongoing process of disciplinary dispersion (in which 'law' was to be differentiated from politics, economics, sociology, anthropology, and so on), the 'truth' of which would be disclosed in the identification of each discipline's own peculiar moment(s) of origin.

The historical consciousness that Ward brought to bear in his account may thus be thought to have three key features: a critique of universal metaphysics in favour of an emphasis upon the spatial and temporal conditions of social and cultural production (of law, ethics, faith, and so on); a belief that each of these orders of knowledge—the temporal and the spatial—were of the same analytical character; and a belief in the specificity of international legal history as a disciplinary subfield. Yet, if these are the main methodological assumptions that might be said to inform the content of his work, they are also assumptions that have a bearing upon

[16] *An Enquiry* (n 5) xx. [17] Ibid 19. [18] Ibid 47.

how that work itself might be received or understood. For, if the history he was to narrate was a history of a contingent historical consciousness, it was one that necessarily posed the same questions of itself: what made it possible for Ward to write this history? What was available to him, in terms of received forms of knowledge or understanding, that made the writing of a history of the law of nations both plausible and necessary? My contention, here, is that Ward was working in a social and intellectual environment in which 'history', as a field of knowledge and a form of social and political consciousness, was not only actively changing shape, but organizing itself around new temporal categories of considerable significance.

3 The *Neuzeit* of Modernity

In the most obvious sense, the emergence of a new historical medium within the discourse of international law in the early nineteenth century may be seen to align with two, specifically European, historiographical developments. On the one side was the emergence of a critical, source-based, methodology that had its roots in the long-standing analytics of erudition (concerned with examining the veracity of sources), diplomatics (the textual examination of documents), paleology (an analysis of antiquities), and philology (concerned with placing a text within its historical and cultural context), and which was to become the hallmark of early nineteenth-century 'professional' historiography.[19] On the other side was the emergence of linear, progressive, histories, that were to mark, in particular, the stadial theories of the Scottish enlightenment[20] and which supplanted the repetitive, cyclical, or providential Biblical chronology that characterized historiography until that time.[21]

In Koselleck's terms, these historiographical developments were key characteristics of what he called the 'new time' (*Neuzeit*) of modernity that was to emerge

[19] See L Ranke, *Theory and Practice of History* (G Iggers ed) (Routledge London 2010); J Michelet, *Histoire de France* (GH Smith trans) (Appleton New York 1847).

[20] A Ferguson, *An Essay on the History of Civil Society* (5th edn T Cadell London 1782 [1767]); J Millar, *Historical View of the English Government* (MS Phillips and DR Smith eds) (4 vols Liberty Fund Indianapolis 2006 [1787]). See also N de Condorcet, *Outlines of an Historical View of the Progress of the Human Mind* (M Carey Philadelphia 1796 [1795]).

[21] See GG Iggers, QE Wang, and S Mukherjee, *A Global History of Modern Historiography* (Pearson Longman Harlow 2008) at 22. As Foucault puts it, the classical conception of history (whether in the form of a Stoic cosmic chronology or a Christian Providentialism) was one that viewed the past as a 'vast historical stream, uniform in all its points, drawing within it in one and the same current, in one and the same fall or ascension, or cycle, all men, and with them things and animals, every living or inert being, even the unmoved aspects of the earth': M Foucault, *The Order of Things* (Routledge London 1989) at 401.

within Europe in the 'saddle period' of the late eighteenth century, the critical features of which being fourfold: 1) it was a conception in which 'history no longer takes place in time, but rather through time'; 2) in which the future was seen to be radically 'open' rather than cyclical or repetitive; 3) in which the diversity of the world could be brought together under the umbrella of a singular chronology (its 'non-simultaneous' simultaneity); and 4) in which 'the doctrine of the subjective position, of *historical perspective* gained cogency'.[22]

Each of these characteristics of Koselleck's analysis had particular consequences for the construction of international legal knowledge over the ensuing century or more. In its first and most immediate sense, a consciousness of history moving through time was a development that had obvious significance for purposes of the identification and characterization of the sources of international law. The natural lawyers who came to be represented, by Ward and his successors, as representatives of the discursive 'tradition' of international law, had worked with a remarkably limited sense of temporal specificity. Grotius, for example, had argued that:

> History in relation to our subject is useful in two ways: it supplies both illustrations and judgements. The illustrations have greater weight in proportion as they are taken from better times and better peoples; thus we have preferred ancient examples, Greek and Roman, to the rest. And judgements are not to be slighted, especially when they are in agreement with one another; for by such statements the existence of the law of nature, as we have said, is in a measure proved, and by no other means, in fact, is it possible to establish the law of nations.[23]

For Grotius, in other words, history was a flat, limitless, field of insight that imposed no order, in its own right, over the marshalling of relevant sources of authority. No sense of temporal proximity operated here as a way of estimating the value of judgement and/or illustration—if anything, authority seemed to be associated with temporal distance (towards the 'better' times of Rome) or with the repetitive reoccurrence of the same (as a means by which 'common agreement' might be discerned).[24] If, in the ensuing century, one may note the subtle appearance of various historical and temporal themes (for example in Pufendorf's account of the development of natural sociability)[25] even as late as Vattel, who wrote very self-consciously about his own 'modern' times, there is

[22] R Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford University Press Stanford 2002) at 165–9.

[23] H Grotius, *De Jure Belli ac Pacis* (FW Kelsey trans) (Clarendon Press Oxford 1925 [1625]) at 26.

[24] Ibid xii and 1–2.

[25] For a discussion see I Hont, 'The Language of Sociability and Commerce: Samuel Pufendorf and the Theoretical Foundations of the "Four Stages" Theory' in A Pagden (ed), *The Languages of Political Theory in Early Modern Europe* (CUP Cambridge 1987) 253–76.

no meter, other than judgement of necessity or nature, that separates the opinions of Justinian or Cicero from those of Wolff.[26]

For the jurists of the nineteenth century, the formerly atemporal field of knowledge and reason was to acquire an historical topography of its own. As de Martens was to put it in 1795, whereas Grotius had formerly relied much on the insights of the poets and orators of Rome,

> [the] political situation of Europe is so much changed, since the fifth century in particular, the introduction of the Christian Religion, and of the hierarchical system and all its important consequences, the invention of gunpowder, the discovery of America and the passage to the East Indies, the ever-increasing taste for pomp and luxury, the jealous ambition of powerful states, the multiplication of all sorts of alliances, and the introduction of the custom of sending Ambassadors in ordinary, have had such an influence in forming our present law of nations, that, in general, it is necessary to go no further back than the middle centuries of the Christian Era . . . It is, then, in the history of Europe (and of the states of which it is composed) during the last centuries, that we must look for the existing law of nations.[27]

Immediately, this was to focus attention on the customs and practices of European states, upon the 'positive' or 'voluntary' law of nations as exemplified in treaties and diplomatic exchanges, rather than upon the rationalist discourse of the natural law. But it was also to reshape the way in which the literary tradition of natural law itself was to be received. The figures of Grotius, Pufendorf, Vattel, and so on would acquire a new vital resonance: no longer would they simply be the most prominent, or wise, advocates of a universal metaphysics (and represent, in that sense, a textual, literary tradition of judgement and opinion), but they would become representatives of a definitively historical tradition of thought and practice located in both time and place. As figures, they would begin to appear from behind the veil of their work—as advisors, philosophers, teachers, advocates—engaged in specified diplomatic, legal, and political activity, arguing with greater or lesser distinction as to the nature or content of the law of nations.[28] Their work, furthermore, would no longer be valued merely in terms of its precision, rigour, or exhaustive character, but by the extent to which it spoke to a contemporary moral or political consciousness that was aware of its own historical place. The historicist alignment of judgement and social context that informed this was to add a new evaluative element to all the standard themes: the enslavement of enemies,

[26] E de Vattel, *The Law of Nations* (Butler Northampton 1805 [1758]) at xiv ('I have taken the greatest part of my examples from modern history, as most interesting, and to avoid repeating those which Grotius, Pufendorf, and their commentators, have accumulated').

[27] *Summary of the Law of Nations* (n 6) 6.

[28] See eg O Nippold, 'Introduction' (FJ Hemelt trans) in C Wolff, *Jus Gentium Methodo Scientifica* (JH Drake trans) (Clarendon Press Oxford 1934 [1749]) xi–lii, at xxvii ('If we would realize the significance of Wolff to his own age, and perhaps beyond that even to our own, we must needs pay attention above all else to the course of his life. Only from the coign of vantage which a knowledge

claims to territory by way of papal grant, or the pursuit of 'just wars' were questions that could no longer be answered simply in terms of ideas of abstract justice, but in terms that recognized both the historical relativity of ethical judgement and the changing character of the social and political field within which they were to operate.

In the second place, if international law was to discover its new tradition, so also was it to discover new temporal categories. The 'present' would emerge, no longer being a 'moment of profound forgetfulness',[29] but as the measure by which the past was to be revealed and analysed. Categories of legal knowledge would gain or lose significance for the commentator now critically aware of their own surroundings. New questions would appear ('recognition', 'intervention', control over the use of weaponry) and old ones be displaced (for example, marriage, procreation, education, or filial duty). New distinctions would also emerge—between 'international' and 'national',[30] between public and private, between law and political economy. Only now would it become plausible to talk about legal change, or evaluate arguments by reference to the contemporary needs or interests of states or societies. The future, furthermore, would also appear to be radically open: a temporal category towards which energies might be invested (towards liberty, justice, and perpetual peace, and away from despotism, absolutism, and war) and around which intellectual and practical projects, programmes, and policies might gain their measure and purpose.[31] If the theme of 'self-perfection' that had run through the work of both Wolff and Vattel, had already opened out the idea of a *telos* of social and political organization (the procuring of the necessities of life, of peace, security, and well-being), it was in the nineteenth century that identifiable nascent 'futures'—civilization, secularism, humanitarianism, and internationalism—were to become the organizing categories of international legal thought, and provide the conditions for thinking about international law in terms of its infinite progress, development, or fruition.

Thirdly, if ideas of law and justice were temporally conditioned, so also, as Ward had intuited, were they spatially determined. Just as the 'present' of international

of his biography supplies can we fully appreciate what we owe to this man or obtain the cultural and historical background upon which the scenes of the work of this philosopher are projected, and against which the figure of Wolff is thrown in extraordinary relief.').

[29] M Foucault, *Society Must be Defended* (D Macey trans) (Picador New York 2003) at 228.

[30] See eg J de Louter, 'Introduction' in C Bynkershoek, *Quaestionum Juris Publici Libri Duo* (T Frank trans) (Clarendon Press Oxford 1930 [1737]) xi–xlvi, at xl–xli ('he disdains the important demarcation between international and national public law and freely intermingles questions of real international relations with those which only concern the constitution of his own country and are ruled by national laws and customs').

[31] K Marx, 'The Eighteenth Brumaire of Louis Bonaparte (1852)' in RC Tucker (ed), *The Marx-Engels Reader* (2nd edn WW Norton and Co New York 1978) 594–617, at 597 ('The social revolution of the nineteenth century cannot draw its poetry from the past, but only from the future').

law, was to be discovered through an analytic that evoked and distinguished past or future, so also did the 'worldliness' of abstract historical knowledge necessarily bring into view the diverse conditions and experiences of people in different parts of the globe.[32] As Koselleck puts it:

> With the opening up of the world, the most different but coexisting cultural levels were brought into view spatially and, by way of synchronic comparison, were diachronically classified. World history became for the first time empirically redeemable; however, it was only interpretable to the extent that the most differentiated levels of development, decelerations and accelerations of temporal courses in various countries, social strata, classes, or areas were at the same time necessarily reduced to a common denominator.[33]

If the subsequent nineteenth century treatises organized themselves around the theme of the emergence of a European society of nation states, they typically did so by way of bringing the differentiated temporalities of a non-European world within a unified historical frame through their assimilation into European civilization's pre-modern past. Just as the conditions of savage existence elsewhere in the world, as Locke had already intimated, provided immediate access to the historic underpinnings of civilized European society, so also were nineteenth-century jurists to recognize the conditions of savage or barbaric existence elsewhere as being open to the possibility of maturation and change, and to the acquisition of legal subjectivity (of their 'entry into history' as Hegel was to put it). This, of course, was to lend itself to a new rationality of imperial rule—the production of civilization through beneficent colonization, and to the organization of legal knowledge around those categories (from the conduct of warfare through to territorial title and statehood).[34] It was also to survive in the diachronic organization of economic thought and practice that we now encounter in the term 'development' or 'developing state'.[35]

Finally, if, as Koselleck notes, the *Neuzeit* was to focus attention upon perspective and standpoint—upon, amongst other things, the social and intellectual framework that undergirded the production of the literature of history itself—not only would history be always organized around the present (requiring it to be persistently rewritten), but it would also be indefinitely plural. The differentiated temporalities that marked the geographic orientation of worldly knowledge, were therefore matched by a simultaneous disciplinary dispersion.

[32] D Chakrabarty, *Provincializing Europe* (Princeton University Press Princeton 2000) at 7 ('Historicism . . . posited historical time as a measure of the cultural distance (at least in institutional development) that was assumed to exist between the West and the non-West').

[33] *The Practice of Conceptual History* (n 22) 166.

[34] See A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP Cambridge 2005).

[35] S Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP Cambridge 2011).

If nature had its own rhythm, production its phases of development, capital its modes of accumulation, prices their own laws of fluctuation and change, and languages a chronology associated with their own particular coherence,[36] so also would the law of nations have its own history, and one that would be distinct, as Ward noted, from political, economic, social, or cultural history. International legal history, thus, was always to be understood in terms of its own generative specificity, with its own moments of inauguration and change, departures and dispersals. The pursuit of its 'origin' would become an important prerequisite: as being that which enabled its capture as a unified and continuous historical phenomenon, and which disclosed, at the same moment, its fundamental essence.

This was, by no means, to resolve itself in a uniform historiography, but was to bring to the forefront two dynamics. In the first place, it would be conditioned by the simultaneous excision of things impure (politics, ethics, sociology, anthropology, economics, and so on), and their reintroduction in the field of legal knowledge as background conditions. History, in other words, would always be written by reference to a sense of law's boundaries, or of its specificity *in relation to* other fields of knowledge and practice:[37] doctrinal accounts in relation to ethics; institutional or realist accounts in relation to politics; comparative accounts in relation to anthropology or sociology.

In the second place, the harmony that had formerly characterized the relationship between the voluntary and natural law of nations was broken apart, and a situated ethics of international law was to be placed in a condition of permanent struggle against the 'realism' of historical knowledge. As Hayden White explains, historiography was to function at this time as the very paradigm of realistic discourse, 'constituting an image of a current social praxis as the criterion of plausibility by reference to which any given institution, activity, thought, or even a life can be endowed with the aspect of "reality"'.[38] History operated in nineteenth-century Europe, in other words, in precisely the same way as 'God' or 'Nature' had in earlier centuries. From here, and as a consequence, doctrine would be opposed to practice, realism pitched against idealism, the apologetic against the utopian, policy against law, the law 'as it is' as opposed to 'as it should be'. And these oppositions would all be internalized within a legal discourse that endeavoured to both situate itself within the field of power so described, but yet also to transcend it.

[36] *The Order of Things* (n 21) 401.

[37] P Allott, 'International Law and the Idea of History' (1999) 1 *Journal of the History of International Law* 1–21, at 1.

[38] H White, *The Content of the Form* (Johns Hopkins University Press Baltimore 1987) at 101.

4 The Historiography of 'Modern' International Law

If, in an immediate sense, the turn to history at the end of the eighteenth century opened the ground for the articulation of a European international law, built upon the (historically conditioned) customs and practices of European nation states,[39] and invested with a teleology that took as its object the advancement of freedom, humanity, peace, and prosperity, it was a consciousness containing, within itself, the conditions of its own critique. For the very object that international lawyers took as their task—the creation of a system of rules and institutions of universal character—was confronted, at every moment, by the apparent particularity of its own historical emergence. If this was not immediately apparent for those engaged in writing the histories of the seamless 'expansion' of international law in the nineteenth and twentieth centuries, or indeed for those concerned with the elaboration of analytical or policy-oriented discourses that operated within historically disinterested fields of enquiry, it was to become very much more so for those either mourning the dissolution of the European nomos,[40] or engaging with the processes of decolonization.[41]

For the new generation 'Third World' scholars of the 1960s such as Anand, Elias, Bedjaoui, Umozurike, and Alexandrowicz the problem was how to put at centre-stage the concerns and interests of the non-European world in conditions under which it had effectively been written out of the discipline's own history. The response was diverse. For some, it was to be achieved through the (re)discovery of lost traditions—of those Asian or African systems of international law that pre-existed colonial rule and interacted with it.[42] For others, it was to be achieved by way of a critique of the ideology of nineteenth century 'doctrinal positivism' which had apparently 'shrunk' the world of international law, ignoring in the process, the empirical practices (treaties, agreements, diplomatic exchanges) that had marked

[39] As Wheaton was to observe, the *jus gentium* was 'a particular law, applicable to a distinct set or family of nations, varying at different times with the change in religion, manners, government, and other institutions': H Wheaton, *Elements of International Law* (Fellowes London 1836) at 44–5.

[40] C Schmitt, *The Nomos of the Earth* (GL Ulmen trans) (Telos Press New York 2003).

[41] See eg RP Anand, *New States and International Law* (Vikas Delhi 1972); CH Alexandrowicz, *The European–African Confrontation: A Study in Treaty Making* (AW Sitjhoff Leiden 1973); TO Elias, *Africa and the Development of International Law* (Martinus Nijhoff Dordrecht 1988). See generally A Becker Lorca, 'Eurocentrism in the History of International Law' in A Peters and B Fassbender (eds), *The Oxford Handbook of the History of International Law* (OUP Oxford 2012) 1034–57, at 1042–50.

[42] See eg *Africa and the Development of International Law* (n 41); RP Anand (ed), *Asian States and the Development of Universal International Law* (Vikas Delhi 1972). See further S Sinha, *Legal Polycentricity and International Law* (Carolina Academic Press Chapel Hill 1996).

the relationship between the European and non-European worlds.[43] Others still embraced the European narrative, confident in the promise of a functionalist analytics that envisaged that changes in the structure of international law would simply ensue as a consequence of the changing shape and character of international society.[44] All embraced in one form or another, however, a belief in the possibility of the articulation of a universal history of international law 'in the wake of Empire' so to speak,[45] whilst maintaining at the same time, the same formal commitments to positive law built upon custom and practice, to the idea of progress, or of law 'responding' to the common needs and interests of nation states. If the terms of this new historiography, thus, were to provide new content to the history of international law, they did so largely by leaving intact the methodological precepts that had shaped the work of those such as Ward. Europe still remained, in that sense, the 'silent referent' of historical knowledge.[46]

In more recent years, the problem of *how* to write the history of international law in a way that does not simply subsume the non-European periphery into an essentially European narrative of progress has been a point of constant attention. And in the process, such histories have gained new inflections. Some, such as Anghie and Becker have sought to reinscribe the periphery within an account of mainstream legal thought and practice, either by identifying it as the unspoken 'referent' of doctrinal argument (in which the 'standard of civilization' is seen to invest itself as a trope within the deep structure of legal doctrine),[47] or by bringing to light the critical contribution of scholars from the periphery in appropriating and reformulating key features of the discipline.[48] Others, by contrast, have sought to displace entirely the centrality of European international law by emphasizing the distinctiveness of contrasting world views—in Onuma's terms, the Islamocentric and Sinocentric—in such a way as to problematize any simple account of the 'expansion' of international law, or of its attainment of a condition of universality.[49]

[43] CH Alexandrowicz, 'The Afro-Asian World and the Law of Nations (Historical Aspects)' (1968) 123 *Recueil des Cours* 117–214; CH Alexandrowicz, 'Empirical and Doctrinal Positivism in International Law' (1975) 47 *British Yearbook of International Law* 286–9.

[44] See eg RP Anand, 'The Influence of History on the Literature of International Law' in R St J MacDonald and D Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Martinus Nijhoff The Hague 1983) 341–80, at 341.

[45] N Berman, 'In the Wake of Empire' (1999) 14 *American University International Law Review* 1515–69.

[46] *Provincializing Europe* (n 32) 28, also quoted in M Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism' (2011) 19 *Rechtsgeschichte* 152–76, at 156.

[47] *Imperialism, Sovereignty and the Making of International Law* (n 34).

[48] A Becker Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation' (2010) 51 *Harvard International Law Journal* 475–552, at 475.

[49] Y Onuma, 'When Was the Law of International Society Born?—An Enquiry of the History of International Law from an Intercivilizational Perspective' (2000) 2 *Journal of the History of International Law* 1–66.

If the main target of such accounts has been the displacement or avoidance of certain facets of the received historical method—denying, for example, the possibility of describing the history of international law in terms of its triumphal, 'progressive', expansion from core to periphery—they have, at the same moment, maintained fealty to the idea that there is a specifiable history of international law whose 'origins' may be traced back to the nineteenth century and beyond, and that the central task is one of redescribing that history in a way that inserts the excluded 'other' back into that story. Whilst, in other words, such counter-histories take on, as Nietzsche described it, a 'critical' as opposed to a 'monumental' cast,[50] they do so nevertheless by leaving intact its basic structure. The problem here is not so much a lack of determination as to what the content of international legal history might be[51]—whether, for example, it is a history of doctrine or practice, a history of structures or processes, a history attentive to the non-European as well as the European experience[52]—but that the question of content, in this case, is not independent of the historical method by which that content is made legible or meaningful. If I am right in observing that international law was to acquire its specifiable and discrete (disciplinary) content through the articulation of historical accounts of its emergence, then it would seem to follow that international law is not simply something that one can examine through the lens of history as if it were some historical artefact existing independently of the means chosen by which it is to be represented, but a field of practice whose meaning and significance is constantly organized around, and through the medium of, a discourse that links present to past. As such, the specification of its origins must always be treated as an act of intervention rather than one of discovery—even if, as we shall see, it is an act which has its own conditions.

In a critique of what he takes to be certain dominant assumptions of mainstream accounts (specifically, those written in progressive, objective, or functionalist terms), Skouteris draws attention to the essentially discursive character of international legal history and to its reducible priority of authorial agency in the 'production' of the past. He forefronts, in the process, two ideas. The first is that the past itself is never available to the legal historian 'as actual events', but only in the form of mediated representations of those events, whether as official records, the work of commentators, or in some other residual or artifactual form. 'History

[50] Nietzsche identified three species of history—the monumental, antiquarian, and critical—which served 'the living man' in three different respects: 'to him as a being who acts and strives, as a being who preserves and reveres, [or] as a being who suffers and seeks deliverance': 'On the Uses and Disadvantages of History for Life' (n 15) 67.

[51] Carty observes acutely that 'the reason international legal history is almost impossible to write is that there is no consensus on what international law is': A Carty, 'Doctrine versus State Practice' in *The Oxford Handbook of the History of International Law* (n 41) 972–96, at 974.

[52] For the varieties of history, see M Koskenniemi, 'A History of International Law Histories' in *The Oxford Handbook of the History of International Law* (n 41) 943–71.

and the past' as he puts it, 'are two different things'.[53] The second, and related, observation is that any work of historical reconstruction will always involve acts of selection and arrangement—decisions both as to what is to be represented (state practice, judicial decisions, and so on), and as to how those past events, once reconstructed, will be organized and related to one another.[54] In a positive sense, this draws attention to what Hayden White calls the 'content of the form': bringing into view the (ideological) role of aesthetic structure or narrative organization in the generation of historical meaning.[55] At the same time, however, Skouteris notes that the further one emphasizes the constructed character of history, and the centrality of the historian in its production, the more it 'seems to dissolve any possible ground for assessing the historical past' and undermines 'the possibility of performing much of the work that any jurist is expected to perform in her everyday tasks'.[56] In cutting away the ground from any representation of the past that seeks to 'unveil' meaning or normative insight from the mere fact of its own disclosure, so also, he fears, it seems to cut away the grounds for any kind of historical critique.

Skouteris' concerns, here, as to the unavailability of a straightforward representative account of history may, in some measure, misconstrue the way in which the past is conceptualized within international legal argument. If what is of concern is the way in which ideas and events from the past may be redeployed to new purpose in the present,[57] then the problem may not be that of getting the history straight so much as understanding the conditions under which certain kinds of history appear to make themselves available in contemporary settings. The past, it might be said, only answers the questions we pose of it, but the kinds of questions we might ask, or the styles of analysis we might deploy, are not themselves limitless.

In Foucault's terms, this is to recommend undertaking an analysis of what he calls the 'contemporary limits of the necessary'. What is needed for that purpose, he suggests, is an 'historical investigation into the events that have led us to constitute ourselves and to recognise ourselves as subjects of what we are doing, thinking, saying'.[58] This may be seen to open out two new avenues of thought. In the first

[53] 'Engaging History in International Law' (n 2) 112. See also R Koselleck, *Futures Past: On the Semantics of Historical Time* (K Tribe trans) (Columbia University Press New York 2004 [1979]) at 111 ('the facticity of events established *ex post* is never identical with the totality of past circumstances thought of as formerly real. Every event historically established and presented lives on the fiction of actuality: reality itself is past and gone.').

[54] 'Engaging History in International Law' (n 2) 113–14.

[55] See generally *The Content of the Form* (n 38).

[56] 'Engaging History in International Law' (n 2) 118.

[57] For an elegant statement of this point see A Orford, 'On International Legal Method' (2013) 1 *London Review of International Law* 166–76. See also A Orford, 'The Past as Law or History: The Relevance of Imperialism for Modern International Law' (NYU Institute for International Law and Justice, Working Paper No 2012/2), subsequently published in M Toufayan, E Tourme-Jouannet, and H Ruiz Fabri (eds), *International Law and New Approaches to the Third World* (Société de Législation Comparée Paris 2013) 97–118.

[58] M Foucault, 'What is Enlightenment?' in *The Foucault Reader* (n 1) 32–50, at 46.

place, it is to give recognition to the idea that the authorial jurist who claims to exercise sovereignty over the literary patterning of the past of international law, is itself a subject inserted within an (historical and) intellectual context. If this works upon Marx's intuition that we make our own history, but not in conditions of our own choosing, the answer is not merely to strip away all superstition about the past (that is, subject it to a critique of ideology), but to identify and specify the historic conditions that both 'produce' the field of professional expertise that enables international lawyers to imagine themselves as interlocutors within a specifiable discourse and practice, and which also serve to delimit the boundaries of what it is possible to say or think in that context. This may be such as to push historiography in the direction of accounts that both situate the emergence of disciplinary expertise within broader social, economic, cultural, and political fields at the same time as orienting it towards broader questions of structure (the conditioning place, for example, of class and capital).

In the second place, and in a similar sense, it pushes attention towards thinking about the contemporary world of international law, not in terms of a specified set of actors and agencies, powers, and competences, that are already firmly grasped as historically 'given', but as things that are constantly in the condition of being ushered into existence, reinforced, and affirmed. If, as Lang points out, one may understand the regulatory activities of institutions such as the World Trade Organization as contributing to, and shaping, our social, political, and economic knowledge of the world (within which it then seeks to insert itself),[59] so also may one understand the regimes of authority that structure international legal doctrine (states, governments, institutions, and so on) as simply that—claims to authority, knowledge, and truth that pattern behaviour through the repeated injunction that we should act 'as if' they were somehow more than that. History written in this guise is history conscious always of its own productive role in making the world appear.

5 Conclusion

The problem I have been trying to put at centre stage in the course of this chapter is one that folds back upon itself: how is one to provide an (historical) account of

[59] A Lang, 'The Legal Construction of Economic Rationalities' (2013) 40 *Journal of Law and Society* 155–71.

the emergence of the category of the historical within international law without already presuming its existence? The result, in a sense, is a partial and imperfect performance of that which I am seeking to describe, but it is a performance nevertheless concerned with elucidating the consequences of a very simple idea: everything has a time and place. As I have sketched it out, the consequences of that insight may be thought to have taken two forms, or to have operated in two phases. In the first of these the agenda was to place international law itself within the frame of history—to historicize its normative conditions, to identify its origins, and to map out its emergence and evolution over time. If, initially, this was to gesture towards the dispersion of things in space (to a differentiated geographical legal knowledge) it was nevertheless reintegrated by means of its incorporation within a singular chronology. Development, progress, evolution were the principal watchwords of this spatio-temporal conglomerate. In the second phase, historical knowledge itself has become the point of focus, in which the grounds and conditions for speaking about the past of international law have themselves opened up to examination through the lens of time and place. Here, historical knowledge is insistently contemporary and ideologically laden, capable of producing insight and critique, but nevertheless posing always the problem of how to grasp itself in its own historical conditions. If the history of international law today is unavoidably a history of the present, one task may be to understand the patterns of deployment and consumption, attending to the blind-spots and biases in contemporary accounts, and yet another and perhaps more arduous task may be to understand the (historic) conditions that delimit the parameters of what may or may not be rendered as the past of international law today.

CHAPTER 2

ROMAN LAW AND THE INTELLECTUAL HISTORY OF INTERNATIONAL LAW

RANDALL LESAFFER

1 Introduction

The pivotal role of Roman law is well established in the historiography of the civil law tradition. Compared to this, its role in the intellectual history of international law is a marginal subject. It has rather drawn scholarly attention as an object of theoretical contention than of substantial scrutiny. Debates turn around two questions: one pertains to the continuity between ancient Roman and modern public international law and the other to the significance of the medieval and early-modern jurisprudence of Roman *private* law for the development of public international law.

The traditional understanding by international lawyers of the history of their field, which was articulated around 1900, has cast a long shadow over the subject. This articulation coincided with the heyday of the sovereign state, positivism, and European imperialism. It is both state- and Eurocentric.[1] Under the traditional

[1] M Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism' (2011) 19

narrative, international law's history only truly began with the emergence of the sovereign state. Its intellectual history started with the first systematic expositions of international law as an autonomous body of law regulating relations between states. By and large, writers of the nineteenth century referred to Hugo Grotius (1583–1645) as the starting point for this history.[2] Around 1900, different scholars began to revaluate the significance of contributions from the sixteenth century, in particular from the Spanish neo-scholastics and a few jurists.[3] Since the middle of the twentieth century, the accepted account is that the Spanish neo-scholastics and the humanists stood at the inception of international law as an intellectual field, casting anything which came earlier into the shadows. This view has a deep impact on the debate about the contribution of Roman law to the intellectual history of international law, in both its dimensions.

First, since the nineteenth century, scholars have debated whether there is enough continuity between the 'international law' of the Romans—and by extension that of the whole of Antiquity—and modern international law to include the former in the history of the latter. Many international lawyers of the nineteenth and early twentieth centuries held to the view that the normative systems of international relations of the ancients were altogether too primitive and different to be considered 'international law'. Among the various arguments which have been forwarded for this, two stand out. The first argument is that the great civilizations of Antiquity, and most of all the Roman, were imperialist, leaving no room for equality between states, which was considered a precondition for any international law. The second argument holds that the normative system of the ancients with regards to external relations was embedded in religion. By consequence, it was unilateral and not based on consent.[4] These explanations tie in with state-centric and positivist understandings of international law. After the Second World War,

Rechtsgeschichte 152–76; Y Onuma, 'Eurocentrism in the History of International Law' in Y Onuma (ed), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (OUP Oxford 1993) 371–86.

[2] See eg DHL von Ompteda, *Literatur des gesammten natürlichen und positiven Völkerrechts* (2 vols Regensburg JL Montags & Erben 1785 reprinted Scientia Aalen 1963); R Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe, from the Greeks and the Romans to the Age of Grotius* (2 vols Butterworth London 1795 reprinted Lawbook Exchange Clark 2005).

[3] James Brown Scott (1866–1943) was instrumental in promoting the Spanish neo-scholastics, in particular the theologians Francisco de Vitoria (*c* 1480–1546) and Francisco Suárez (1548–1617). His *Classics of International Law* (38 vols Carnegie Endowment for International Peace 1911–1950) did much to create a classical text canon of the law of nations. The series included works by the jurists Pierino Belli (1502–1575), Baltasar Ayala (1548–1584), and Alberico Gentili (1552–1608).

[4] C Focarelli, 'The Early Doctrine of International Law as a Bridge from Antiquity to Modernity and Diplomatic Inviolability in 16th- and 17th-Century Practice' in R Lesaffer (ed), *The Twelve Years Truce (1609): Peace, Truce, War and Law in the Low Countries at the Turn of the 17th Century* (Martinus Nijhoff Leiden 2014) 210–32. See also A Nussbaum, 'The Significance of Roman Law in the History of International Law' (1952) 100 *University of Pennsylvania Law Review* 678–89, at 678–81.

several historians of international law challenged and introduced a more relative definition of 'international law', expanding it to all forms of law regulating relations between independent polities, regardless of its religious foundations. This has allowed the indication of the existence of some form of 'international' law for different periods of Antiquity.[5] In most recent times, the view has been forwarded that even hegemony and empire did not signal the end of Roman 'international law'. The Roman Empire had to contend at all times with at least one equal empire, first the Parthian (until 224 CE) and then the Sassanid.[6] Also, the Roman Empire dealt with its 'barbarian' neighbours as well as client states using the rules and procedures of 'international law'.[7]

The acknowledgement of the existence of Roman 'international law' does not, however, exhaust the debate on its relevance for modern international law. The question remains whether Roman international law forms a relevant part of modern international law's history. While there is no support for the idea that Roman and modern international law are parts of one evolving system, there is growing consent that certain customs, institutions, and doctrines of the Romans are at the root of their modern variants. In some cases, one can speak of a continuous process—as for *amicitia*[8] or *bellum justum*[9]—while in other cases, medieval and humanist rediscoveries of Roman law were more instrumental—as with *occupatio* or *uti possidetis*.[10]

Secondly, nineteenth-century international lawyers were very aware—more so than their present-day successors—that medieval Roman as well as canon lawyers discussed subjects of 'international law', but with few exceptions they took a negative view of the work of these medieval scholars. Their reasons varied, but the common denominator was that they considered it proof of the lack of autonomy

[5] DJ Bederman, *International Law in Antiquity* (CUP Cambridge 2001); W Preiser, 'Die Epochen der antiken Völkerrechtsgeschichte' (1956) 11 *Juristenzeitung* 737–44; K-H Ziegler, 'Conclusion and Publication of International Treaties in Antiquity' (1995) 29 *Israel Law Review* 233–49.

[6] K-H Ziegler, *Die Beziehungen zwischen Rom und die Partherreich: Ein Beitrag zur Geschichte des Völkerrechts* (Steiner Wiesbaden 1964); B Dignas and E Winter, *Rome and Persia in Late Antiquity: Neighbours and Rivals* (CUP Cambridge 2007).

[7] N Grotkamp, *Völkerrecht im Prinzipat: Möglichkeit und Verbreitung* (Nomos Baden 2009); D Nörr, *Imperium und Polis in der hohen Prinzipatszeit* (2nd edn Beck Munich 1969); R Schulz, *Die Entwicklung des römischen Völkerrecht im vierten und fünften Jahrhundert* (Steiner Stuttgart 1993).

[8] B Paradisi, 'L'amicizia internazionale nell storia antica' and 'L'amicizia internazionale nell' alto medio evo' in *Civitas Maxima: Studi di storia del diritto internazionale* (Olschki Florence 1974) vol 1, 296–338 and 339–97.

[9] SC Neff, *War and the Law of Nations: A General History* (CUP Cambridge 2005) at 34–8 and 46–9.

[10] R Lesaffer, 'Argument from Roman Law in Current International Law: *Occupatio* and Acquisitve Prescription' (2005) 16 *European Journal of International Law* 25–58, at 38–56; L Winkel, 'The Peace Treaties of Westphalia as an Instance of the Reception of Roman Law' in R Lesaffer (ed), *Peace Treaties and International Law in European History: From the End of the Middle Ages to World War I* (CUP Cambridge 2004) 222–37, at 222–4.

of international law.[11] Over the twentieth century, as positivist and state-centred readings of the history of international law receded, scholars took a more neutral view of the role of medieval jurisprudence but the subject in general was met with blanket neglect. The view that the intellectual history of international law really took off in the sixteenth century still holds sway. Studies of medieval Roman and canonistic jurisprudence on matters of international relations remain extremely rare.[12]

The main thrust of this chapter is to correct the existing imbalance in current scholarship that largely ignores or at least underestimates the influence of Roman law on the development of international law. This is done by offering a survey of the historical interactions between Roman law and international law, drawing from general insights into the intellectual history of law in Europe that have remained remarkably absent from the grand narrative of the history of international law. The focus will be on the periods in which these interactions were most pronounced. Next to Roman Antiquity these are the Late Middle Ages (eleventh to fifteenth centuries) and the Early Modern Age (sixteenth to eighteenth centuries).

2 Roman Antiquity (Seventh Century BCE–Sixth Century CE)

The oldest traces of Roman 'public international law', in the sense of law regulating relations with other polities, are to be found in the context of the *jus fetiale*. This refers to the rites of the fetial priests used among others to bind the Roman people to treaties with a foreign people or to declare war.[13] The *jus fetiale* offers an example of the fact that among ancient civilizations the norms and procedures regulating foreign relations were binding because of religious sanction—the invocation of a curse of the gods on the Roman people. It was a body of procedures and underlying norms that dealt with, among other things, foreign relations. It was not of international but Roman origin. This did not impede it from forming an effective ground

[11] R Lesaffer, 'Roman Law and the Early Historiography of International Law: Ward, Wheaton, Hosack and Walker' in T Marauhn and H Steiger (eds), *Universality and Continuity in International Law* (Eleven International The Hague 2011) 149–84.

[12] Such exceptions are P Haggenmacher, *Grotius et la doctrine de la guerre juste* (PUF Paris 1983); J Muldoon, 'Medieval Canon Law and the Formation of International Law' (1995) 112 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, kanonistische Abteilung* 64–82.

[13] Livy, *The History of Rome*, 1.24.4 and 1.32.6. See also A Watson, *International Law in Archaic Rome: War and Religion* (Johns Hopkins University Press Baltimore 1993).

on which to vest binding relations. There is historical evidence of the Romans making treaties whereby both parties invoked their own gods.[14]

As the Romans expanded their power over Italy and the Mediterranean between the fourth and the first century BCE, a greater body of institutions and norms about matters of war and peace, trade, seafaring, and diplomacy developed. Far from only imposing their own customs and ideas, the Romans adopted and adapted those of other peoples such as the Greeks and Carthaginians. The Roman version of 'public international law' extended far beyond the restricted and religion-based *jus fetiale*.[15] As these peoples had in turn been inspired by the 'international law' of the great civilizations of the Ancient Near East, such as the Egyptians, Assyrians, and older Mesopotamian empires, one may speak of a measure of continuity between pre-classical, Greek and Roman 'international law'.[16]

Little of the Roman practice and doctrine of international law has found its way into the compilation of Roman law of the Emperor Justinian (529–65).[17] The main title in the *Digest* covering matters of war and peace is D 49.15 *De captivis et de postliminio redemptis ab hostibus*.[18] Far more informative to modern scholars have been historical texts—such as those by Polybius (c 200–118 BCE) and Livy (59 BCE –17 CE)—as well as rhetorical and philosophical works—chiefly by Cicero (106–43 BCE). It is important to note that much of the latter textual canon was unknown to the medieval jurists so they had only the information from the *Digest* and the other parts of Justinian's compilation to go on. Major historical and rhetorical sources would only be rediscovered and studied by the humanists.

Let us now briefly look at the material substance of Roman international law. Roman legal practices and doctrines in relation to foreign affairs covered all of the major subjects which would constitute 'international law' until deep into the nineteenth century: war and peace, treaties, diplomacy, and (maritime) trade.[19]

The term *jus belli ac pacis* which Grotius would later use to refer to the laws of war and peace-making in the sense of *jus ad bellum, jus in bello*, and *just post bellum* came from a speech by Cicero.[20] The Romans knew a rudimentary *jus ad bellum* in their concept of *bellum justum et pium*. Under the *jus fetiale* a war had to be formally declared upon the enemy after the Romans sought redress for the wrong the enemy had allegedly committed. War was an enforcement action after injury,

[14] 'Conclusion and Publication of International Treaties in Antiquity' (n 5) 234–9.

[15] ES Gruen, *The Hellenistic World and the Coming of Rome* (University of California Press Berkeley 1984) chs 1–5.

[16] R Ago, 'The First International Communities in the Mediterranean World' (1982) 53 *British Yearbook of International Law* 213–32.

[17] All translations from the *Digest* are from A Watson (ed), *The Digest of Justinian* (2 vols revised edn University of Pennsylvania Press Philadelphia 1998).

[18] See also *Codex Justiniani* 8.50.

[19] For a survey, K-H Ziegler, *Völkerrechtsgeschichte: Ein Studienbuch* (2nd edn Beck Munich 2007) at 35–61.

[20] Cicero, *Pro Balbo*, 6.15.

as it would be in the medieval just war doctrine.[21] Cicero mentioned two just causes for war: defence and avenging a wrong.[22] Roman practice indeed shows that the Romans argued that their wars were defensive or reactions against a prior wrongdoing by the enemy.[23] Roman law distinguished war between public enemies, who had a right to equal treatment under the laws of war, from violence between non-public enemies; such as robbers and pirates.[24] In relation to *jus in bello*, the right to *postliminium* stands out. Through its place in the *Digest* (D 49.15), it became one of the Roman conceptions of the laws of war and peace which was most discussed in medieval and early-modern jurisprudence.[25] The Romans recognized the binding character of treaties during wartime. Main wartime treaties included armistices (*indutiae*),[26] safe conducts, and exchanges of prisoners.[27] There were two major forms of ending wars (*just post bellum*): peace treaties and surrender (*deditio*).[28]

The Roman practice of treaty-making was similar to that of the Ancient Near East or the Ancient Greeks. Treaties were oral agreements which were confirmed by oath and invocations of the wrath of the gods in case of violation. Treaties were commonly written down and published, but this was not constitutive of their binding character. This procedure would remain standard until deep into the Middle Ages. The Roman term for a public treaty made according to this procedure was *foedus*. As the Roman network of foreign relations expanded territorially, it became unpractical to have the treaties confirmed by *fetiales*. Their role in the making of treaties was assumed by magistrates—and later the emperor—while the ritual character of the procedure lessened.[29] Next to *foedus*, the Romans used more informal ways of making treaties. There was the *sponsio* whereby magistrates who had not been mandated by the people or senate made a treaty through the mutual exchange of promises. The people or senate retained the right to reject the treaty afterwards.

[21] *War and the Law of Nations* (n 9) 34–8 and 45–68; J von Elbe, 'The Evolution of the Concept of Just War in International Law' (1939) 33 *American Journal of International Law* 665–88, at 666–7.

[22] Cicero, *De re publica*, 3.35a.

[23] *International Law in Antiquity* (n 5) 207–41; WV Harris, *War and Imperialism in Republican Rome 327–70 BC* (Clarendon Press Oxford 1979) 175–254.

[24] *Digest* (n 17) 49.15.24.

[25] Ibid 49.15.5 for prisoners of war; 49.15.19 for property; 41.1.5.7 for the basis of Roman right of booty (*jus praedae*). See also *International Law in Antiquity* (n 5) 242–60; J Plescia, 'The Roman "Ius Belli"' (1989–1990) 92–3 *Bullettino dell'istituto di diritto romano Vittorio Scialoja* 497–523.

[26] *Digest* (n 17) 49.15.19.1.

[27] K-H Ziegler, 'Kriegsverträge im antiken römischen Recht' (1985) 102 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung* 40–90.

[28] C Baldus, '*Vestigia pacis*: The Roman Peace Treaty: Structure or Event' in *Peace Treaties and International Law in European History* (n 10) 103–46; K-H Ziegler, 'Friedensverträge im römischen Altertum' (1989) 27 *Archiv des Völkerrechts* 45–62; 'Kriegsverträge im antiken römischen Recht' (n 27) 51–6, 67–70, 79–86.

[29] A Nussbaum, 'Forms and Observance of Treaties in the Middle Ages and the Early 16th Century' in GA Lipsky (ed), *Law and Politics in the World Community: Essays on Hans Kelsen's Pure Theory and Related Problems in International Law* (University of California Press Berkeley 1953) 191–8; 'Conclusion and Publication of International Treaties in Antiquity' (n 5).

Furthermore, the Romans applied the concept of good faith (*bona fides*)—which had been inspired by its Greek analogue (πίστις)—to treaties.[30] Two important types of relationships, next to peace and alliance, were *amicitia* and *hospitium*. *Amicitia* (friendship) entails a mutual recognition of equality and is the precondition on which to vest peaceful relations. It lays down the foundations for further legal relations between peoples. It can either be established through treaty or in a more informal way.[31] *Hospitium* (guest friendship) is a treaty whereby two polities promise legal protection to one another's subjects. As such, it is the basis for trade.[32] Finally, the Romans knew the principle of the inviolability of diplomats.[33]

But the major contribution Roman law made to the intellectual history of international law is probably through the introduction of the term *jus gentium* and its multiple meanings. Originally, *jus gentium* (law of nations) did not refer to relations between polities. It was the law the Roman magistrates applied to foreigners. In this respect, it was a kind of 'universal' private law, albeit of Roman making. It was a set of *formulae*—written documents allowing a case to be taken to court—which were introduced by the magistrate who had jurisdiction over foreigners in Rome, the *praetor peregrinus* (from 242 BCE). Although its development was as casuistic as that of the *jus civile*, it had a higher level of abstraction than the latter as the *praetor peregrinus* had to span differences between the legal cultures involved.[34]

With time, Roman orators and jurists made three semantic moves with *jus gentium*. First, a close association was made between *jus gentium* and *jus naturale*. The Romans adopted the notion of humanity as a universal community and natural law as a universal law innate in (human) nature from Greek Stoic philosophy. Cicero, who played a significant role in transferring Greek philosophical ideas into the Roman literary tradition, associated *jus gentium* with natural law.[35] The association was reiterated by Gaius (second century CE) in a text also quoted in the *Digest*.[36] It highlighted the universal as well as foundational dimension of *jus gentium*. Whereas in fact it was the product of inductive generalization from Roman and foreign legal

[30] D Nörr, *Die Fides im römischen Völkenrecht* (Muller Heidelberg 1991); 'Conclusion and Publication of International Treaties in Antiquity' (n 5); *Völkerrechtsgeschichte* (n 19) 39–40.

[31] PJ Burton, *Friendship and Empire: Roman Diplomacy and Imperialism in the Middle Republic (353–146 BC)* (CUP Cambridge 2011); A Heuss, 'Die völkerrechtlichen Grundlagen der römischen Assenpolitik in republikanischer Zeit' (1933) 13 *Klio Beiheft* 1–59, at 46; B Paradisi, 'L'amitié internationale: les phases critiques de son ancienne histoire' (1951) 78 *Recueil des Cours* 325–78.

[32] *International Law in Antiquity* (n 5) 120–36; K-H Ziegler, 'Regeln für den Handelsverkehr in Staatsverträgen des Altertums' (2002) 70 *Legal History Review* 55–67.

[33] *Digest* (n 17) 50.7.18; *International Law in Antiquity* (n 5) 88–119; TRS Broughton, 'Mistreatment of Foreign Legates and the Fetial Priests: Three Roman Cases' (1987) 41 *Phoenix* 50–62.

[34] M Kaser, *Ius gentium* (Böhlau Köln 1993).

[35] Cicero, *De officiis* 3.23: 'The same thing is established not only in nature, that is in the law of nations…'. Translation from Cicero, *On Duties* (MT Griffin and EM Atkins eds and trans) (CUP Cambridge 1991) at 108.

[36] *Digest* (n 17) 1.1.9 (Gaius 1.1): '…By contrast, that law which natural reason has established among all human beings is among all observed in equal measure and is called *jus gentium*, as being the law which all nations observe.'

systems, the Ciceronian move laid the foundation for later conceptions of *jus gentium* as the legal expression of immutable and universal principles.

Secondly, the classical jurist Ulpian (*d* 223/224) defined natural law as the law common to all animals, while *jus gentium* was the law common to all men. Ulpian did not state that *jus gentium* was the natural law of mankind, but many have understood it to be so.[37]

Thirdly, in the *Digest* a definition of *jus gentium* is to be found that encompasses both the original meaning of universal private law as that of a law of foreign relations. In D 1.1.5 the post-classical jurist Hermogenian (lived *c* 300) defined *jus gentium* as the law whereby '…wars were introduced, nations differentiated, kingdoms founded, properties individuated, estate boundaries settled, buildings put up, and commerce established, including contracts of buying and selling and letting and hiring (except for certain contractual elements established through *jus civile*).' The definition of Saint Isidorus, Bishop of Seville (*d* 636) in his *Etymologiae* only included aspects of foreign relations, except for one (mixed marriages).[38]

With these steps, Roman jurisprudence bequeathed to the Middle Ages a concept of *jus gentium* that spanned two meanings: that of a universal law, which might well apply to individuals as to polities; and that of a law applicable to relations between polities. It also bequeathed a strong association between *jus gentium* and *jus naturale*.[39]

3 The Late Middle Ages (Eleventh to Fifteenth Centuries)

Late-medieval jurists did not perceive of *jus gentium* as an autonomous body of law governing relations between independent political entities. Neither did they make it into an autonomous academic discipline with its own literature. But this did not prevent them from writing extensively, and with a great deal of sophistication,

[37] *Digest* (n 17) 1.1.1.3–4, see 4: '*Jus gentium*, the law of nations, is that which all human peoples observe. That it is not co-extensive with natural law can be grasped easily, since the latter is common to all animals whereas *jus gentium* is common only to human beings among themselves.'

[38] Isidorus, *Etymologiae*, 5.6: 'The law of nations concerns the occupation of territory, building, fortification, wars, captivities, enslavements, the right of return, treaties of peace, truces, the pledge not to molest embassies, the prohibition of marriages between different races. And it is called the "law of nations" because nearly all nations use it.' Translation from Isidorus, *The Etymologies of Isidore of Seville* (SA Barney et al., eds and trans) (CUP Cambridge 2006) at 118.

[39] K Tuori, 'The Reception of Ancient Legal Thought in Early Modern International Law' in B Fassbender and A Peters (eds), *The Oxford Handbook of the History of International Law* (OUP Oxford 2012) 1012–33, at 1016–8.

on issues relating to war, peace, treaties, diplomacy, and trade between polities and thus making a significant contribution to the intellectual development of international law.

The rediscovery of a full copy of the *Digest* in the third quarter of the eleventh century marked the beginning of medieval jurisprudence. By the end of the century, Roman law was taught on the basis of Justinian's compilation—known since the sixteenth century as the *Corpus Juris Civilis*—at the emerging university of Bologna. By the end of the twelfth century, university teaching of the *jus civile* had spread over Italy, France, Spain, and England. Between the fourteenth and sixteenth centuries it spread to the centre, north, and east of Europe.

But the study of Roman law was only one branch of the learned law of the Late Middle Ages. The Gregorian Reform of the mid-eleventh century and the ensuing rise of the papal monarchy led to the growth of canon law into an extensive and sophisticated body of law. It became the subject of study at university schools of canon law. Around 1140, an authoritative collection of canon law was made by Gratian, the *Decretum Gratiani*. It quickly became the standard source for the discipline. In 1234, Pope Gregory IX (r 1227–1241) promulgated the *Liber Extra*, a codification of canon law from after the *Decretum*, at one and the same time stamping his authority on Gratian's work. Together with the *Liber Sextus* (1298) and two smaller collections from the fourteenth century, these texts constituted the authoritative sources of canon law. The collection was later named the *Corpus Juris Canonici*. As opposed to Roman law, which was not directly applicable law in most places in Europe, canon law was the applicable law of the Church. Through its hierarchical network of courts and the wide jurisdiction it claimed in matters such as family or contract law, it had a huge impact on the legal development of Europe. As canon law had adopted much from Roman law, it was an important factor in the reception of Roman law as well.[40]

Roman and canon law form the twin branches of the late-medieval jurisprudence of the Latin West, the *jus commune*. The civilians and canonists were scholastics as much as the theologians were, and they made a significant contribution to the development of scholastic theory and methodology. The foundational tenet of scholasticism was that truth as revealed by God was laid down in authoritative texts. This was a vast and expanding collection of texts including the Bible, the writings of the Church Fathers, the works of some ancient philosophers such as Plato and Aristotle, and the two *corpora* of Roman and canon law. The authority of the texts was absolute. One should be capable of extracting from the totality of the sources an objective, immutable, and consistent truth. Translated to the world of law this implied that the study of the Justinian and/or canon law texts should

[40] J Brundage, *Medieval Canon Law* (Longmans London 1995) 44–56; RH Helmholz, *The Spirit of Classical Canon Law* (University of Georgia Press Athens 1996) 1–32.

lead to the discovery of a law which was complete, consistent, timeless, universal, and which provided a just solution to any legal problem. Scholastic logic—dialectics—was the sophisticated tool the medieval scholars developed to bridge the gap between the idealism of their claims and the reality of the texts.[41]

Legal historians distinguish two major, subsequent 'schools' in the study of Roman law in the Middle Ages. First came the glossators. Their endeavours culminated in the *Glossa Ordinaria* by Accursius (*c* 1182–1263). After these came the commentators, who would dominate most European law schools until the seventeenth century. For canonists, a parallel distinction is made between decretists and decretalists with the promulgation of the *Liber Extra* as the dividing line. It is hard to pinpoint the differences between the glossators and commentators, but in general terms medieval jurisprudence can be understood in terms of an incremental shift from text to content. Whereas the first generations of civilians were mostly concerned with understanding and explaining the authoritative text itself, the later generations took more distance from the texts in their search for the ideal law they hoped to extract from them. This is best illustrated by referring to the main genres of literary production of the two schools. The glossators wrote their explanations down in the form of *glossae*. These were accumulating layers of (mostly marginal) notes in which they offered textual or content explanations, pointed at parallel locations, and reasoned away contradictions. The commentaries of the later civilians were longer discussions on larger fragments of the *Corpus Juris Civilis*, allowing for more systematization and above all, freedom. This enhanced autonomy was even more evident with treatises, which were expositions on a certain topic whereby the author could order his sources freely. Treatises started to emerge from the fourteenth century onwards but only truly broke through in the sixteenth century. The shift from text to content also caused the civilians to expand their canon of texts. They addressed legal questions by applying different sources to the matter, spanning Roman law, canon law but also *jura propria*. Furthermore, the medieval civilians were increasingly involved with practice. Professors of the *jus civile* were frequently asked to render a legal advice in current disputes. Leading commentators such as Bartolus of Saxoferrato (1314–1357) and Baldus de Ubaldis (1327–1400) wrote numerous *consilia*.[42]

Medieval civilians as well as canonists wrote extensively about matters of war and peace, diplomacy, and trade. They developed sophisticated doctrines on these subjects. For the most parts, these writings are not to be found in self-standing texts, but were fully part and parcel of their writings on law in general. Much of the relevant medieval scholarship therefore needs to be extracted from the glosses

[41] W Ullmann, *Medieval Foundations of Renaissance Humanism* (Cornell University Press Ithaca 1977) at 14–29.

[42] R Lesaffer, *European Legal History: A Cultural and Political Perspective* (CUP Cambridge 2009) at 252–65.

and commentaries of both civilians and canonists all throughout their works. Furthermore, numerous *consilia* by the commentators are relevant. These could involve *consilia* written for the purpose of a case before a feudal, royal, or imperial court. But it could also pertain to diplomatic disputes, which were not brought into court.[43] Canon law even had a more direct connection to practice as ecclesiastical courts—with the papal *Rota Romana* at the apex of the hierarchy—held jurisdiction over major issues of diplomacy such as the violation of treaties confirmed by oath and claims to the justice of war.[44]

From the fourteenth century onwards, a limited number of treatises on relevant subjects were produced. Most notably among these are the treatise on reprisals by Bartolus,[45] the treatises on war, reprisals and duels by Giovanni da Legnano[46] as well as the treatises by the fifteenth-century Italian canon lawyer Martinus Garatus Laudensis on diplomacy and treaties.[47] The great collection of fifteenth and sixteenth century canon law treatises *Tractatus Universi Juris* contains some additional tracts on war and peace as well as diplomacy.[48] From the fifteenth century, there are more treatises on diplomacy and diplomatic law.[49]

Medieval civilians and canonists discussed matters of war, peace, trade, and diplomacy in their glosses and commentaries at those places where they found a *sedes materiae*, literally 'a seat of the matter' in the authoritative text. As has already been indicated, the Justinianic collection held relatively little information on the Roman 'international law'. The main titles from the *Digest* were D 1.1 *De justitia et jure*, D 49.15 which dealt with prisoners of war, *postliminium* and treaties,[50] D 49.16 *De re militari* which covered matters of military discipline and

[43] Jurisprudence also had its influence on diplomatic practice felt through the role of jurists in that practice—as ministers or diplomats—as well as through the use of public notaries to make diplomatic instruments such as treaties. Important collections on notarial practice such as the *Speculum judiciale* (*c* 1290) of Gulielmus Durantis (*c* 1237–1296) contained examples of diplomatic instruments: *Speculum juris* (Basel Frobenii 1574, reprinted Aalen Scientia 1975) 4.1 *De treuga et pace*.

[44] *The Spirit of Classical Canon Law* (n 40) 126–7; R Lesaffer, 'Peace Treaties from Lodi to Westphalia' in *Peace Treaties and International Law in European History* (n 10) 9–41, at 22–6.

[45] See Bartolus, 'Tractatus Represaliarum' in *Consilia, questiones, et tractatus […]* (Venetiis per Batistam de Tortis 1529 reprinted Il Cigno Galileo Galilei Rome 1996) at 115vb–120va.

[46] Giovanni da Legnano, *Tractatus De Bello, De Represaliis et De Duello* (TE Holland ed) (2 vols OUP Oxford 1917 [1477]).

[47] Martinus Garatus Laudensis, *De legatis et legationibus tractatus varii* (VE Grabar ed) (C Mattiesen Dorpat 1905 [1625]); Martinus Garatus Laudensis, *Tractatus de confederatione, pace et conventionibus principum* in *Peace Treaties and International Law in European History* (n 10) 412–47.

[48] *Tractatus Universi Juris* (Venetiis apud Franciscum Zilettum 1584–1586) vol 16 (*De dignitate et potestate seculari*) (with treatises by Garatus and Belli but also with treatises on war by Johannes Lupus and Franciscus Arias, all known to Grotius) but also vols 10–12 (with treatises on truce and peace by Octavianus Volpellius and Nicolaus Moronus).

[49] See B Behrens, 'Treatises on the Ambassador Written in the Fifteenth and Early Sixteenth Centuries' 51 (1936) *English Historical Review* 616–27.

[50] See also *Codex Justiniani* 8.50.

jus in bello,[51] as well as D 50.7 *De legationibus*, on diplomats. To this a few texts on feudal law, the *Libri feudorum*, which had made their way into the medieval version of the Justinianic codification, can be added. This allowed commentators to expand on matters of political organization and public authority. As relevant was the addition of the *Pax Constantiae* of 1183 between Emperor Frederick I (*r* 1155–1190) and the Lombard League, which elicited writings on peace-making and peace treaties.[52] The main locations in the *Corpus Juris Canonici* were Gratian on just war[53] and the title *De treuga et pace* from the *Liber Extra*.[54]

This all in all limited basis did not prevent medieval jurists from dealing extensively with international relations; quite the contrary. Civilians, as well as canonists, did not have to restrict themselves to Roman 'international law' texts to apply to matters of war, peace, trade, and diplomacy. The whole range of authoritative texts could be brought to bear on these subjects. The civilians applied a multitude of texts and doctrines from Roman law which in origin bore no relation to these matters. Many of these stemmed from Roman private law. The main examples of these 'transplants' include the use of contract law in relation to treaties,[55] property law in relation to territory and boundaries (*jus finium*)[56] as well as *jus in bello* and *jus praedae*,[57] the law of delict and criminal law in relation to the use of force, Roman private arbitration in the context of arbitration between princes and polities,[58]

[51] See also Ibid 12.35. For a more complete survey of relevant passages in the Justinianic texts, see A Wijffels, 'Early-Modern Scholarship on International Law' in A Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar Cheltenham 2011) 23–60, at 29–32 and see especially K-H Ziegler, 'Die römische Grundlagen des europäischen Völkerrechts' (1972) 4 *Ius Commune* 1–27.

[52] Odofredus (*d* 1265) and Baldus de Ubaldis wrote extensive commentaries on the *Pax Constantiae*. See also Baldus on LF 2.27 *De pace tenenda, et eius violatoribus* from the *Libri feudorum* as well as *Consilium* 2.195 in Baldus, *Consilia* (Venice 1575 reprinted Bottega d'Erasmo Turin 1970); R Lesaffer, 'Gentili's *ius post bellum* and Early Modern Peace Treaties' in B Kingsbury and B Straumann (eds), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (OUP Oxford 2010) 210–40, at 216–7; K-H Ziegler, 'The Influence of Medieval Roman Law on Peace Treaties' in *Peace Treaties and International Law in European History* (n 10) 147–61.

[53] *Decretum Gratiani* 23 q 2 c 2, referring to Isidorus, *Etymologiae* 18.1.2/3. On just war in medieval theology and canon law, see J Barnes, 'The Just War' in N Kretzman et al., (eds), *The Cambridge History of Later Medieval Philosophy* (CUP Cambridge 1982) 750–84; *Grotius et la doctrine de la guerre juste* (n 12) 51–444; *War and the Law of Nations* (n 9) 45–82; FH Russell, *The Just War in the Middle Ages* (CUP Cambridge 1975).

[54] *Liber Extra* (1234) X.1.34. For more canon law texts, see J Muldoon, 'The Contribution of Medieval Canon Lawyers to the Formation of International Law' (1972) 28 *Traditio* 483–97.

[55] R Lesaffer, 'The Medieval Canon Law of Contract and Early Modern Treaty Law' (2000) 2 *Journal of the History of International Law* 78–98.

[56] P Marchetti, *De iure finium: Diritto e confini tra tardo Medioevo ed età moderna* (Giuffrè Milan 2001).

[57] *Digest* (n 17) 43.16 (*De vi et de vi armata*) and *Codex Justiniani* 8.4.

[58] K-H Ziegler, 'Arbiter, arbitrato und amicabilis compositor' (1967) 84 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung* 376–81.

as well as the use of the contract of *mandatum* for diplomats.[59] But there is also a manifold of less obvious examples, such as from succession law.[60]

To the medieval jurists this came naturally. In fact, they would not have thought of this in terms of 'transplants', and this is for two reasons. First, although the concepts of public and private law were known and operated, they did not define distinct spheres of law yet. Neither was there a strict separation between the international and domestic legal orders. Public authority was not yet monopolized by one level of government. The order of the Latin West was one of a hierarchical continuum of polities and jurisdictions, ranging from the pope and emperor at the top over kingdoms, principalities, feudal lordships and city-states to a myriad of local authorities at the base. These all stood in some hierarchical relation to one another, having original authority or jurisdiction for some matters and being a subject power for others. The authority to engage in war, peace, and diplomacy was, by consequence, diffused over a great variety of entities and the dividing line between what constituted 'public' and 'private' was not clear. While this certainly troubled medieval jurists, the question whether a certain use of force was an instance of public war or private violence was not always easy to answer. Some jurists did refer to the law applicable to international relations as *jus gentium* but that was not the full or exclusive meaning of the term. Its primary meaning was that of a universal law and the distinction between universal private law and public international law was collapsed in it as it was in reality.[61]

Secondly, the medieval jurists did not conceive of a separate jurisprudence of international law, as they did not conceive of their field as fragmented in any way. The law to be found in the authoritative sources of Roman and canon law was not only timeless and universal; it was also 'whole'. It was permeated by one objective, absolute truth, ultimately vested in divine revelation. Principles and rules which applied to one subject were necessarily valid for others. This concept of 'totality'[62] went beyond the law. It stretched to any other field of study, most significantly theology.

In relation to international law as to any other aspect of the law, civil and canon law were more than just two pillars of the *jus commune*. They operated in close conjunction. Many medieval jurists had been exposed to the two branches of the learned law as students and many scholars drew from both textual canons in dealing with concrete issues. It is actually in the interplay between Roman law and canon law (and theology) that medieval jurisprudence was at its most creative and

[59] DE Queller, *The Office of the Ambassador in the Middle Ages* (Princeton University Press Princeton 1967).

[60] See the use of *Digest* 24.3.38 by Martinus Garatus Laudensis in *Tractatus de confederatione, pace et conventionibus principum* (n 47) 425 q xxix.

[61] SC Neff, 'A Short History of International Law' in MD Evans (ed), *International Law* (2nd edn OUP Oxford 2006) 3–31, at 6–7.

[62] *Medieval Foundations* (n 41) 14–19.

made its most valuable contributions to the civil law tradition and the jurisprudence of international law. To this, two remarks may be added. First, even when they were dealing with similar questions, Roman lawyers on one side and theologians and canon lawyers on the other had different focuses. The primary concern of theologians and canon lawyers in raising legal questions was what man's behaviour would do to his eternal life. Whether his actions constituted sins or not. In this respect, their law applied in the forum of conscience (*forum internum*) and was first and foremost centred on general rules of morality. Canon law was at the same time the law applicable and enforceable in ecclesiastical courts and thus also pertained to the *forum externum*, providing sanctions in the here and now. In consequence, it was also a detailed and sophisticated technical body of law. The primary focus of Roman lawyers was on the here and now, on the legal effects and sanctioning of human behaviour by other humans. Secondly, in very general terms, one could say that in the interplay between canon and Roman law, the former brought in the general (moral) principles and the latter the technical elements. The formulation of the principles of *pacta sunt servanda* and the general liability for compensation of wrongful damages offer important examples of this.[63]

4 The Early Modern Age (Sixteenth to Eighteenth Centuries)

The first half of the sixteenth century saw the collapse of the medieval legal order of the Latin West. The Reformation made what had been the foundation of its unity into the fault line of its fracture. By the middle of the century, approximately half of Europe rejected the authority of the pope, the ecclesiastical courts, and canon law, thus tumbling one of two pillars on which the order of Europe rested. By the end of the century, canon law had also ceased to play a major role in international relations within the Catholic world. The conquests in the Americas caused the need, at least in the eyes of many, for an international law which was not based on Roman or canon law. The emergence of powerful composite monarchies led to the final destruction of the universal claims of the emperor and the pope in secular, and sometimes even spiritual, matters. Together with the influence of humanism, this led to a gradual 'nationalization' of civilian jurisprudence.[64]

[63] W Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (ca 1500–1650)* (Martinus Nijhoff Leiden 2013) at 105–61; J Gordley, *The Philosophical Origins of Modern Contract Law* (OUP Oxford 1991).

[64] See *European Legal History* (n 42) 303–8.

The ensuing crisis of international order of the West would endure until a new legal order was articulated in the second half of the seventeenth century, *after* the Peace of Westphalia (1648), that of the *jus publicum Europaeum*. It fostered intellectual dynamism in the field of international relations and is one of the explanations behind the birth of the law of nations as an autonomous discipline. The collapse of the authority of canon law and the gradual fragmentation of Roman jurisprudence along state-lines forced scholars to look for an alternative locus of authority for the legal organization of international relations. This was to be natural law.

Modern literature has defined two major schools of thought to classify the writers of the law of nations of the sixteenth and early seventeenth centuries: neo-scholastics and humanists. While these are defendable categories, it is not always evident to what school a certain author belongs. Moreover, one should be careful not to overstate the homogeneity within each school or the differences between them. The distinction is sometimes understood as one between theologians and canon lawyers on the one hand and civilians on the other. While the picture from real life is again far more complex than that, it can be held that humanism had a significant impact on the civilian jurisprudence of the law of nations.[65]

In the early sixteenth century, humanism gained a foothold at different law faculties, most famously at Bourges in France. However, humanism did not overhaul the dominant position of the commentators at most European law schools and neither did it lead, even among humanist jurists themselves, to a complete break with scholasticism, regardless of the severe criticism by humanists of it. All in all, there were very few radically consequential humanists among the jurists. On the other hand, humanism had a profound influence on civilian jurisprudence, also in relation to the law of nations. By the middle of the seventeenth century, a reformed paradigm of civilian jurisprudence was in place, which drew on both scholastic and humanist traditions.[66]

The influence of humanism on civilian jurisprudence was fourfold. First, the humanists looked at the authoritative textual canon through the lens of a different paradigm than the scholastics. To them the authoritative sources stemming from Antiquity were not the repository of a revealed, absolute, universal, and timeless truth but the synthetic products of an historic civilization. They were worthy of study because the Greek and Roman cultures were considered the historical high-points of human achievement. Their authority degraded from absolute to relative, from indisputable to that of an example to be emulated. In this respect, the humanist demarche was first and foremost a historical one. The primary endeavour of humanism was to create an historically correct reconstruction of the text and its authentic meaning. However, with few exceptions, even the more radical humanists among

[65] *The Roman Foundations of the Law of Nations* (n 52); R Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (OUP Oxford 1999).

[66] 'Early-Modern Scholarship on International Law' (n 51) 35–51.

the civilians did not stop there. The historical paradigm did not prevent them from applying Roman law to current issues, much in the same way the commentators had. But, with time, later in the sixteenth century, they started to do so with more critical distance than their medieval predecessors. One took inspiration from Roman law not because it held a claim to absolute authority, but because a certain rule was the best example available. By the mid-seventeenth century, the criterion of evaluation forwarded would be accordance to reason and rational natural law. In this way, humanism helped pave the way for the Modern School of Natural Law with Grotius as the foremost transitional figure. However, until deep into the eighteenth century if not later, a self-evident association between Roman law and natural reason survived. This was helped along by the fact that a claim to rationality implied a claim to universality. Against local and national laws, Roman law could still play a trump card even if the 'universal' character of civilian jurisprudence withered.[67]

Secondly, humanism expanded the classical textual canon of the civilians. In addition to the *Corpus Juris Civilis* and the canonistic, theological, and philosophical sources of medieval scholarship, civilians also drew on newly discovered ancient historical, rhetorical, and philosophical texts. Among others, the works of Polybius, Livy, Seneca (*c* 4 BCE–65 CE), Tacitus (*c* 56–117), and above all Cicero were brought to bear on the law of nations.

Thirdly, as the authority of Roman law became relative, humanism gave a new stimulus to widening the scope of legal argument and looking at other law systems, primarily *jura propria* and emerging national laws. In this respect, humanists contributed to the 'nationalization' of civilian jurisprudence, thereby undercutting the universal authority of Roman law.

Fourthly, humanism fostered the systematization of law. The replacing of the complex 'system' of the *Digest* with that of the more transparent *Institutes* allowed for a more rational ordering of the law and marked a new step in the emancipation from the sources. Moreover, treatises became a far more significant genre than before. From the second half of the sixteenth century, a growing number of autonomous treatises on aspects of the law of nations appeared.[68] The treatises of Belli,[69] Ayala,[70] and Gentili[71] are the best-known examples of these. Grotius, who was an accomplished humanist man of letters, may be counted with them.

[67] 'Early-Modern Scholarship on International Law' (n 51) 51.

[68] DR Kelley, 'Civil Science in the Renaissance: Jurisprudence in the French Manner' (1981) 3 *Journal of the History of Ideas* 261–76; *European Legal History* (n 42) 350–9; P Stein, 'Legal Humanism and Legal Science' (1986) 54 *Legal History Review* 297–306; J Witte, *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (CUP Cambridge 2002).

[69] P Belli, *De re militari et bello tractatus* (HC Nutting trans) (2 vols Clarendon Press Oxford 1936 [1563]).

[70] B Ayala, *De iure et officiis bellicis et disciplina militari libri III* (J Westlake ed JP Bate trans) (2 vols Carnegie Institute Washington DC 1912 [1582]).

[71] Mainly A Gentili, *De iure belli libri III* (JC Rolfe trans) (2 vols Clarendon Press Oxford 1933 [1598/1612]).

These treatises are among the first attempts to treat with the laws of war and peace-making in a systematic as well as a comprehensive way. They marked the emancipation of *jus gentium* in the sense of the law regulating relations between independent polities as an autonomous discipline.[72] Recent scholarship—particularly from the angle of the history of political philosophy—has by and large explained humanist jurisprudence in terms of a direct discovery of and interaction with ancient historical, rhetorical, and philosophical sources, almost completely ignoring the mediating role of medieval scholarship.[73] Some scholars who restored the humanists' entanglement with the Justinianic codification into the discussion have done this without giving acknowledgement to the fact that the humanists stood in an almost 500-year old tradition of studying Roman law and have written about this in terms of an original discovery of Roman law rather than a *re*discovery through a different looking glass.[74]

The early-modern jurisprudents of international law related with Roman law in two different ways. First, as has been underscored in recent scholarship, they expanded their knowledge about Roman 'international law' thanks to the new discovery of ancient Roman historical, rhetorical, and philosophical sources. Secondly, they continued the dialogue with Roman law which had started in the eleventh century, albeit from a partially different perspective. The expansion of the textual canon by the humanists surely changed their views on ancient Roman law, but it did not prevent them from building on the work of their medieval predecessors, much as they might criticise them. From the humanist perspective, the writings of the medieval jurists were just another source of arguments to bring into the discussion and they would measure them critically as they would even the *Corpus Juris* itself. This also applies to Grotius whose work is full of references to medieval civilians and canonists and who underwrites many of their positions.[75]

[72] More so than most of the neo-scholastic theologians such as Suárez who embedded their reflections into general theological works. Vitoria's famous *Relectiones de Indis* and *De jure belli* could qualify as autonomous expositions but not as comprehensive expositions of the laws of war and peace-making: F de Vitoria, *De Indis et de iure belli relectiones* (Carnegie Institute Washington DC 1917 [1539/1696]). See also F de Vitoria, *Political Writings* (A Pagden and J Lawrence eds) (CUP Cambridge 1991); F Suárez, *Selections from Three Works* (2 vols Clarendon Press Oxford 1944).

[73] *The Rights of War and Peace* (n 65).

[74] DJ Bederman, 'Reception of the Classical Tradition in International Law: Grotius' *De jure belli ac pacis*' (1996) 10 *Emory International Law Review* 1–50; B Straumann, *Hugo Grotius und die Antike: Römisches Recht und römische Ethik im frühneuzeitlichen Naturrecht* (Nomos Baden 2007); B Straumann, 'The *Corpus iuris* as a Source of Law between Sovereigns in Alberico Gentili's Thought' in *The Roman Foundations of the Law of Nations* (n 52) 101–23. For sources with more recognition of medieval jurisprudence, see L Benton and B Straumann, 'Acquiring Empire by Law: From Roman Doctrine to Modern European Practice' (2010) 28 *Law and History Review* 1–38; 'Reception of Ancient Legal Thought' (n 39). In a similar vein, the dependence of the neo-scholastics on medieval canonistic jurisprudence has been significantly underplayed. For an affirmation of the role of canon law, see 'Medieval Canon Law and the Formation of International Law' (n 12) 67–76.

[75] For the critical edition, see H Grotius, *De jure belli ac pacis libri tres* (R Feenstra and CE Persenaire eds) (Scientia Aalen 1993). See also *Grotius et la doctrine de la guerre juste* (n 12).

The combining of these two approaches to Roman law as well as the increasingly relative approach to the authorities and the framework of systematization granted these early jurisprudents of the law of nations the flexibility to rise to the challenges of their day and age and adapt medieval doctrines to them. These challenges included the achievement of external sovereignty as well as the gradual monopolization of external relations by the main princes of Europe, the more encompassing nature of warfare, religious strife, maritime and imperial expansion. In answering these, the sixteenth and early seventeenth century jurisprudents of the law of nations continued to draw on medieval jurisprudence.[76]

One of the primary contributions of the sixteenth and early seventeenth century jurists was their conceptual disentanglement of the two meanings of *jus gentium*. Richard Zouch (*c* 1590–1661) famously restored the Roman term of *jus fetiale* for 'public international law'.[77]

The disentanglement was carried out at the conceptual level but it was certainly not wholly achieved in material terms. The work of Grotius is generally considered to form the synthesis and culmination point of sixteenth-century scholarship, both of neo-scholastics and humanists, as well as the transition point to the classical writers of the seventeenth and eighteenth centuries.[78] Grotius laid out with great clarity the duality of the law of nations which would become one of the hallmarks of the jurisprudence of the classical law of nations: that of the distinction and interplay between natural and positive law. Grotius distinguished two bodies of *jus gentium*: the primary law of nations, which was natural law as applied to polities and the secondary or voluntary—positive—law of nations. The first applied in the forum of conscience (*forum internum*); the second generated legal effects in the here and now (*forum externum*).[79]

The Dutch humanist marked the transition from a direct appeal to the authority of Roman law to an indirect appeal through the mediation of natural law. After Grotius and until deep into the nineteenth century, mainstream doctrine remained dualist. Although some authors—who have often been classified as positivists—such as Samuel Rachel (1628–1691),[80] Johann Wolfgang Textor (1638–1701)[81] or

[76] R Lesaffer, 'The Classical Law of Nations (1500–1800)' in *Research Handbook on the Theory and History of International Law* (n 51) 408–40; *Völkerrechtsgeschichte* (n 19) 117–68.

[77] R Zouch, *Iuris et iudicii fecialis, sive iuris inter gentes, et quaestionum de eodem explicatio* (JL Brierly trans) (2 vols Carnegie Institute Washington DC 1911 [1650]).

[78] H Bull, B Kingsbury, and A Roberts (eds), *Hugo Grotius and International Relations* (Clarendon Press Oxford 1990); *Grotius et la doctrine de la guerre juste* (n 12); *A Normative Approach to War* (n 1); *The Rights of War and Peace* (n 65) 78–108.

[79] H Grotius, *De jure belli ac pacis* (FW Kelsey trans) (2 vols Carnegie Institute Washington DC 1913 [1625/1646]) 1.3.4.1, 3.3.4–5 and 3.3.12–13.

[80] S Rachel, *De jure naturae et gentium dissertationum* (JP Bate trans) (2 vols Carnegie Institute Washington DC 1916 [1676]).

[81] JW Textor, *Synopsis juris gentium* (JP Bate trans) (2 vols Carnegie Institute Washington DC 1916 [1680]).

Cornelius van Bynkershoek (1673–1743)[82]—focused on positive law, they did not reject the foundational role of natural law.[83] As Grotius had done, most authors distinguished between a primary natural law, which was applicable to human beings, and a secondary natural law (or primary law of nations), which was derived from it and was applicable to states.[84] Through this, a basis for the entanglement between private and international law was retained.

By the mid-seventeenth century, mainstream doctrine had fixed the locus for the universal validity of the law of nations in natural law. But for many of the writers of the period, primary natural law as applicable to individuals provided the broader context for the law of nations. The great treatises of the naturalists of the seventeenth and eighteenth centuries, starting with Grotius, did not restrict themselves yet to *jus gentium* as the law applicable to the relations between polities, but encompassed lavish discussions on private law.[85] And even when writers did restrict themselves to the law of nations properly speaking, private (Roman) law references and analogies continued to loom large. In fact, much of the medieval and sixteenth-century civilian and canonist doctrines were recycled into the law of nations under the hood of natural law. Examples of this are just war, the principle of *pacta sunt servanda* or the doctrine of the right of sovereigns to punish grave violations of natural law such as cannibalism or incest.[86] The locus of their authority had changed from Roman or canon law to natural law, but the doctrines themselves were not surrendered. This was far more apparent for Roman law, which still had a spontaneous association with being universal and thus constituting more of a treasure trove for the discovery of natural law principles than it was for canon law. Nevertheless, through the intertwining of Roman and canon law during the fourteenth and fifteenth centuries—as in relation to treaties and *jus ad bellum*—the historical impact of canon law was assured. In some instances, new or renewed analogies to Roman law were made, as with the development of the doctrines of *occupatio* and *uti possidetis* for the legitimation of colonial expansion.[87]

[82] C van Bynkershoek, *Quaestionum juris publici libri duo* (T Frank trans) (2 vols Clarendon Press Oxford 1930 [1737]).

[83] For the nineteenth century, see C Sylvest, 'International Law in Nineteenth-Century Britain' (2004) 75 *British Yearbook of International Law* 9–69.

[84] See also E Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Pédone Paris 1998); E Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law* (CUP Cambridge 2012) at 11–106; M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP Cambridge 2005) at 71–122; A Orakhelashvili, 'The Origins of Consensual Positivism—Pufendorf, Wolff and Vattel' in *Research Handbook on the Theory and History of International Law* (n 51) 93–110.

[85] The main examples include the works of Samuel Pufendorf (1632–1694) and Christian Wolff (1679–1754). See S Pufendorf, *De jure naturae et gentium libri octo* (CH Oldfather and WA Oldfather trans) (2 vols Clarendon Press Oxford 1934 [1688]); C Wolff, *Jus naturae methodo scientifica pertractatum* (8 vols Hildesheim Olms 1968–72 [1740–48]); C Wolff, *Jus gentium methodo scientifica pertractatum* (JH Drake trans) (2 vols Clarendon Press Oxford 1934 [1749]).

[86] *The Rights of War and Peace* (n 65) 34–40 and 81–9.

[87] A Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c 1500–c 1800* (Yale University Press New Haven 1995).

The classical writers of the law of nations of the seventeenth and eighteenth centuries also continued the process of systematization that the commentators had started and the humanists had brought up to speed. Against the backdrop of the claims to universality and rationality which were made for natural law, medieval and later doctrines were brought to a higher level of abstraction and generality, then to be flexibly adapted to relations between states when applied in the context of the law of nations.[88]

5 The Modern and Post-Modern Ages (Nineteenth to Twentieth Centuries)

In 1927, Hersch Lauterpacht (1897–1960) published his *Private Law Sources and Analogies of International Law*.[89] Lauterpacht listed numerous instances of the use or transfer of private law into public international law. He readily associated private law and Roman law, even mixing the terms at times. Lauterpacht saw three different points of impact of Roman private law upon public international law. First, there was the historical role of civilian jurisprudence in the formation of international law during the Early Modern Age. Secondly, Roman law still had an indirect impact as it was an important historical source for—primarily but not exclusively—the municipal systems of the countries of the civil law tradition. Because Roman law was their common root, it was convenient shorthand for articulating the 'general principles of law as recognised by civilised nations' which the *Statute of the Permanent Court of International Justice* had named as one of the sources of international law.[90] Thirdly, Roman law remained, even up until Lauterpacht's day, a direct source for private law analogies because it was still considered *ratio scripta*. The latter was particularly valid for common lawyers in whose system of private law Roman law had been less incorporated and in whose minds it had better retained its position as an articulation of natural law or general principles.

[88] As with the doctrine of *occupatio* which now, contrary to what had been the case under Roman *jus civile*, became generally applicable to land. See 'Acquiring Empire by Law' (n 74) 12–8; 'Argument from Roman Law in Current International Law' (n 10) 40–4.

[89] H Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (Longmans & Green London 1927).

[90] *Statute of the Permanent Court of International Justice* (1921) art 38(3). See also *Statute of the International Court of Justice* (1945) art 38(1)(c).

Lauterpacht's empirical study of nineteenth-century adaptations and analogies of (Roman) private law has not yet been surpassed and makes a convincing argument that the transfer from private law to international law did not come to an end in the eighteenth century. One might argue that the rejection of natural law by late nineteenth-century and early twentieth-century positivists as a material source of law forced them to transfer doctrines from the world of natural law to that of positive law.[91] But Lauterpacht's interest was not historical, nor did his work lead to a renewed interest in the historical impact of Roman private law on international law. Lauterpacht construed his book as a defence for the use of private law analogies as a way of articulating 'general principles of law'.[92] In this he was to be disappointed by later twentieth century practice, most assuredly in relation to Roman law. A perusal of the jurisprudence of the International Court of Justice shows no new direct appeals to Roman law to introduce new doctrines of international law or new interpretations thereof.[93] Roman law has now ceased to play a role in the formation of international law. It can, finally, be relegated to history.

[91] Such as the doctrine of self-defence: see *War and the Law of Nations* (n 9) 241–6.

[92] 'Argument from Roman Law in Current International Law' (n 10) 26–38.

[93] H Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (OUP Oxford 2013) vol 1, at 232–46 and vol 2, at 1201–5.

CHAPTER 3

TRANSFORMATIONS OF NATURAL LAW

GERMANY 1648–1815

MARTTI KOSKENNIEMI

1 Introduction

Alongside professional jurists and diplomats, also political thinkers, philosophers, reformers, and visionaries of all sorts regularly engage with international law. Its materials lend themselves as much to abstract contemplation about the human condition as to demonstrations of technical skill. But jurists, too, oscillate between routine interpretations of technical rules and abstract debates about the frame in which the rules receive meaning. Are the most important legal problems about how best to apply the existing system? Or should the system—the 'frame'—be rethought in some way? An examination of whether jurists have been more inclined to engage in the routines of legal work or debates about the frame tells us much about the law's relationship with the surrounding world. To illustrate this, I will examine the transformation of ideas about international power that took place in the idiom of natural law between 1648 and 1815, a key period of early Western modernity. Although my focus will be limited to Germany, similar developments took place across Western Europe at the time. That the debate was waged in a *legal* idiom has to do with the special role played by university jurists

in the Holy Roman Empire (of the German nation). Pressed in part by external events and in part by developments in the relations between the empire's constituent units, jurists switched between abstract justification of the imperial structure and deliberating the technical merits of alternative legislative policies. 'Natural law' and 'positivism' operated side by side, one concerning itself with the inherited frame, the other with the routines of centralized government and policy. These debates had an immediate relevance to how German jurists conceived *jus gentium* (the law of nations) and why they would finally discuss it under the title of 'public law of Europe'.[1] The transformations of natural law in the period 1648–1815 not only consolidated a familiar division of labour between intellectual disciplines but also constructed and delimited the ways in which what is settled in the international world and what is open for political contestation was to be conceived up to our day.

2 Frame: The Natural Reason of Statehood

The religious wars of the sixteenth century shook the ideological foundations of European societies. In the realm of the 'Holy Roman Empire of the German Nation', the Peace of Westphalia (1648) intensified confessional oppositions by demanding territorial separation on a religious basis. The devastations had given rise to a popular scepticism, further exacerbated by the advances of the natural sciences. Might it not be possible to understand human society, too, by a vocabulary that would be free from connotations of religious dogma, one that would address invariable, purely empirical aspects of human nature? Already the Dutchman Hugo Grotius had found in humans a certain 'Inclination to live with those of his own Kind, not in any manner whatever, but peaceably', combining it with a complex view of subjective right ('Faculty') that would support a natural law that was 'so unalterable, that God himself cannot change it'.[2] A few years later, Thomas Hobbes in England developed a view of natural law that was simply about the mechanical control of human fears and desires: 'Therefore, before the names of Just and Unjust can have place, there must be some coercive power, to compel men equally to the

[1] See further M Koskenniemi, 'Between Coordination and Constitution: International Law as a German Discipline' (2011) 15 *Redescriptions: Yearbook of Political Thought, Conceptual History and Feminist Theory* 45–70. All translations are by the author unless otherwise noted.

[2] H Grotius, *On the Law of War and Peace* (Liberty Fund Indianapolis 2006 [1625]) bk I ('The Preliminary Discourse') § VI (79–80), ch I § IV (138), ch I § X (155).

performance of their Covenants, by the terror of some punishment, greater than the benefit they expect by the breach of their Covenant'.[3]

Engaging with both Grotius and Hobbes, the Saxon Samuel Pufendorf (1632–94) agreed that whatever directives for behaviour existed, they were artificial, human creations.[4] They were not arbitrary for that reason, however, but emerged from the application of reason to empirical data. The idea behind Pufendorf's 'geometrical method' was to break present society down into its anthropologically basic elements and then explain its complexity by recomposing it from the elements thus received.[5] The most basic datum we knew about human beings was their self-love, connected with an intense drive for self-preservation in the conditions of pathetic weakness. For such creatures, reason dictated one overriding rule: it commanded sociability:

> Man, then, is an animal with an intense concern for his own preservation, needy by himself, incapable of protection without the help of his fellows, and very well fitted for the mutual provision of benefits.[6]

There was nothing locally specific about these features; the conclusion that humans had to behave sociably had the same universality as the laws of geometry. The state of nature was not, as Hobbes had suggested, a state of constant violence or fear, however. On the contrary, the ability to reason pushed humans to develop 'positive' institutions of all kinds, even before states were in place, including property and contractual networks for the purchase of things needed for sustenance.[7] But these institutions remained precarious as long as there was 'no one who can by authority compel the offender to perform his part of the agreement or make restitution'.[8] The natural history of society peaked in the decision by primitive communities to set up a political state, decide its constitutional form, and subordinate themselves to its ruler.[9] In this way, the state could be received from an argument about self-love, weakness and the ability to reason. Nature itself would explain the necessity

[3] T Hobbes, *Leviathan* (CB Macpherson ed) (Penguin New York 1968 [1651]) pt I ch 15 (202).

[4] Although, as he says, some of these precepts are so plain that we can easily mistake them for being innate: S Pufendorf, *On the Duty of Man and Citizen* (J Tully ed) (CUP Cambridge 1991) at 37.

[5] The term '*mos geometricus*' signified either a method that strived for clarity and systemic coherence in general, or precisely the analytical-composite approach expounded above. See H Denzer, *Moralphilosphie und Naturrecht bei Samuel Pufendorf* (Beck Munich 1972) at 35–58, 282–3, and 279–96.

[6] *On the Duty of Man and Citizen* (n 4) 35.

[7] 'Since men's natural state includes the use of reason we cannot, or should not, separate it from any obligation pointed at thereby': S Pufendorf, *On the Law of Nature and of Nations* (Lichfield Oxford 1710) bk II ch 2 § 9 (147). For an extensive discussion of Pufendorf's 'natural private law', valid already in the state of nature, see S Goyard-Fabre, *Pufendorf et le droit naturel* (PUF Paris 1994) at 125–57.

[8] *On the Duty of Man and Citizen* (n 4) 118.

[9] For the famous 'two agreements and a decree' structure of the state-building process, see *On the Law of Nature and of Nations* (n 7) bk VII ch 2 §§ 7–11.

to have positive laws and taxes and a powerful sovereign to maintain peace so that self-love could be directed to productive work and commerce.[10]

Pufendorf's empirical natural law explained and justified the supreme power (*Landeshoheit*) of German territorial rulers, directing them to reasonable objectives; the security and welfare of the community above all. In fact, Pufendorf defined 'law' itself 'as a decree by a superior to an inferior, accompanied by a sanction and an unconditional duty of the subject to obey'.[11] The ruler needed absolute power to rule efficiently. But this did not mean he could rule as he wished. 'The safety of the people is the supreme law', Pufendorf wrote, and he engaged in extensive discussions on good laws and just punishments.[12] The whole point of a *scientific* account of statehood was to bind the ruler to the principles that science (or its representatives) would produce. Between the utopia of scholastic justice and the apology of arbitrary will lay, for Pufendorf, the *social rationality of natural law* as a composite of techniques of peace, security, and welfare. If these were lost, then social power was lost; the link between protection and obedience was broken and the authority of the sovereign would lapse.[13] This, experience told him, nobody had reason to want.

Pufendorf's significance to the law of nations has often been limited to what he had to say about war and treaties in the last three chapters of *De jure naturae et gentium*. However, much more important is the view that among nations, the same principles of sociability would apply as among individuals in the state of nature. Treaties, for example, were like any laws based on the will of the sovereign—not an 'arbitrary' will but one that would support and enforce antecedent social norms, the imperatives of security and welfare. They were binding as they 'define the terms of reciprocal performance of some duty already enjoined by natural law, and those which go beyond the duties of natural law, or at least put in a specific form what seems indefinite in natural law'.[14] That is to say, treaties were binding as long as they were useful, while those that had become 'pernicious' had to be repudiated immediately, for 'no state is obligated more to anyone than to its own citizens'.[15] Under the law of nations the search for *salus populi* became the foundation of foreign policy.[16]

> The just causes of engaging in war come down to the preservation and protection of our lives and property against unjust attack, or the collection of what is due to us from others but has been denied, or the procurement of reparations for wrong inflicted and of assurance for the future.[17]

[10] *On the Law of Nature and of Nations* (n 7) bk II ch 3 § 16 (210–13).

[11] Ibid bk I ch 6 § 14 (104–8).

[12] Ibid bk VII ch 9 § 3 (1118); *On the Duty of Man and Citizen* (n 4) 151–7.

[13] I Hunter, *Rival Enlightenments: Civil and Metaphysical Philosophy in Early Modern Germany* (CUP Cambridge 2001) at 156 and 158–63.

[14] *On the Duty of Man and Citizen* (n 4) bk II ch 17 § 1 (173).

[15] *On the Law of Nature and of Nations* (n 7) bk VIII ch 6 § 14 (260).

[16] J Brückner, *Staatswissenschaften, Kameralismus und Naturrecht: Ein Beitrag zur Geschichte des politischen Wissenschaft im Deutschland des späten 17 und frühen 18 Jahrhunderts* (Beck Munich 1977) at 171.

[17] *On the Duty of Man and Citizen* (n 4) bk II ch 16 § 2 (168).

The argument from self-love and weakness gave a ready portrait of Europe as a set of egoistic but interdependent sovereignties whose interest was to cooperate, not to fight. War was justified only by a direct injury to oneself, and not by some putative violation of an abstract norm.[18]

Pufendorf's analysis was situated in post-war Germany where efficient authority had broken down and could not be restored by traditional religious or political approaches. The justification of statehood was received from an 'empirical' argument: the observation that human beings were self-loving and weak, and thus in need of a strong hand to guide them. If natural law justified absolutist statehood, it was accompanied by a science of government in which positive law was understood as part of the routines of statecraft, directed towards the realization of the interest of the whole.[19] In a widely read analysis of the constitutional problems of the Holy Roman Empire, Pufendorf had focused on the absence of a single, easily locatable sovereignty in the imperial realm. The overlapping powers of the emperor and the territorial princes emerged from disparate agreements, capitulations and de facto practices. The analysis was altogether geared in a pragmatic direction—how best to realize the interests of each imperial unit?[20] This, he argued, required thinking of Germany as a 'system of states' where the powers of each should be coordinated for the maximum benefit of all, an arrangement also in the general European interest.[21] In a further work, *Introduction to the History of the Great Empires and States of Contemporary Europe* (1682–5), he instructed young men looking for a court position in the arts of government. By making the distinction between 'imaginary' and 'real' interests, Pufendorf aimed to develop a natural law into a scientific statecraft that would enable the deduction of the 'reason of state' from the nation's history and resources.[22]

3 Routines: Operating the State-Machine

The Pufendorfian frame revolutionized the thinking not only of law but of statecraft and morality and turned *jus naturae et gentium* into the predominant vocabulary

[18] *On the Law of Nature and of Nations* (n 7) bk VIII ch 6 § 2.

[19] See further *Pufendorf et le droit naturel* (n 7) 101.

[20] S Pufendorf, *The Present State of Germany* (MJ Seidl ed) (Liberty Fund Indianapolis 2007) ch VII §§ 8–10.

[21] Ibid ch VIII § 3.

[22] S Pufendorf, *Commetarii de rebus Suecicis ab expeditione Gustavi-Adolphi usque ad abdicationem Christinae* (Ribbius Utrecht 1686); S Pufendorf, *Einleitung zu der Historie der*

of eighteenth-century German political thought.[23] The leading early enlightenment German intellectual, jurist, and Rector of the University of Halle, Christian Thomasius (1655–1728), further developed natural law into a frame for utilitarian politics that was to operate with the causality of human behaviour, dominated by the will.[24] Will, again, depended on 'effects' that consisted of reactions to the external world, dictated by the search for pleasure and the avoidance of pain. In social life, it was impossible to reach these objectives without cooperation.[25] Even as the 'wise' may know the precepts of natural law and thus learn to cooperate spontaneously, this was not the case with ordinary subjects who had to be guided to the good path. There would be close collaboration between the university and the ruler. The professor was to give counsel on natural law, on the basis of which the prince would legislate so as to bring about the security and happiness of his people.[26]

In his mature *Fundamenta juris naturae et gentium* (1705), Thomasius laid out his famous threefold distinction between the norms of '*honestum*' (personal morality), '*decorum*' (social morality/politics) and '*justum*' (positive law), thus demarcating sharply between 'internal' and 'external' norms, only the latter of which were the proper field of legal intervention.[27] If the counsel given by the jurist under natural law had the character of *honestum*, it was up to the prince to decide what was called for by *decorum* or *justum*, only the latter of which embodied a superior–inferior relationship. What would this make of the law of nations? Efforts to argue that there was an analogous (superior–inferior) relationship between 'moral' and 'barbaric' nations led nowhere; who could tell which nations belong in which group? The whole distinction was an anachronistic leftover from Greek and Roman times. Moreover, there was no legislator in the international world, and never had nations come together to set up a common law. But even if they had done this, the force of their agreement would still be based on natural and not positive law—that is to

vornähmsten Reiche und Staaten von Europa, vorinnen des Königreichs Schweden (Knoch Frankfurt 1709); S Pufendorf, *An Introduction to the History of the Principal Kingdoms and States of Europe* (Knapton London 1728). See further A Dufour, 'Pufendorf' in JH Burns and M Goldie (eds), *The Cambridge History of Political Thought: 1450–1700* (CUP Cambridge 1991) 561–88, at 584–5.

[23] It was not only the most general part of the law—a jurisprudence—but 'an overarching vocabulary of all discourses about human beings, including history, law, morality and theology': H-E Bödeker and I Hont, 'Naturrecht, Politische Ökonomie und geschichte der Menschheit. Der Diskurs über die Gesellschaft in frühen Neuzeit' in O Dann and D Klippel (eds), *Naturrecht—Frühaufklärung—Revolution* (Meiner Hamburg 1995) at 82.

[24] C Thomasius, *Grundlehren des Natur und Völkerrechts* (F Grunert ed) (Olms Hildesheim 2003 [1709]) bk I ch 1 § 37.

[25] Ibid bk I ch 2 §§ 44–57 (67–9).

[26] Ibid bk I ch 4 §§ 51–7 (85). For Thomasius' conception of the 'wise' (*Die Weise*) and the 'stupid' (*Die Narren*) see at §§ 1–50 (76–84).

[27] See ibid. For a useful comparison of the three sets of norms—*honestum, iustum, decorum*—see further F Grunert, *Normbegründung und politische Legitimität: Zur Recht und Staatsphilosophie der deutschen Frühauflkärung* (Niemeyer Tübingen 2000) at 217–25.

say, it would remain mere counsel.[28] This was not to say that there were no rules on diplomacy, treaty-making, or war. Each was part of the external public law of the state and the jurisdiction of the monarch, to be used for peace and happiness. Instead of ascending to the level of *justum* they were part of *decorum*, aspects of politics and habitual behaviour.[29] This did not deny their reality, only their enforceability as positive law. The law of nations was best understood as a set of spontaneous cultural practices that were very important for the prince and public officials to know. A good politician, Thomasius used to argue, was also a good jurist, and the other way around.[30]

One of Thomasius' most interesting followers was Hieronymus Gundling (1671–1729), a sharp-witted and opinionated lecturer who had no time for metaphysical speculations. The point of the study of *ius naturale et gentium* was utility, he argued, the attainment of 'external peace' brought about by laws understood as commands by a superior supported by sanctions.[31] Like Pufendorf, Gundling received natural rights and duties from the hypothesis of a state of nature where individuals had originally been free and equal and entitled to do whatever they willed. To secure the enjoyment of the fruit of their labour, they had created the institutions of property and sovereignty, moving from the 'absolute' to a 'hypothetical' state of nature between primitive communities. In due course, families had joined together to form political states to better secure their peace—'when one draws the sword, then all will draw it'.[32] But the widest application of the 'hypothetical state of nature' concerned the basic institutions of international commerce, diplomacy, and war among European nations.[33] This law consisted of contextual derivations of what was needed to preserve peace. For example, diplomatic immunities were received from the fact that submitting ambassadors to the jurisdiction of the receiving states would undermine their ability to maintain peaceful relations.[34] Causing damage violated rights and rights-violation disturbed the peace. However inconvenient it was, in the absence of organized enforcement natural rights were ultimately vindicated by war.[35]

As law became intellectual derivations for peace-keeping, it coalesced with wise policy. But Gundling was deeply sceptical about the ability of statesmen to learn

[28] *Grundlehren* (n 24) bk I ch 5 § 76 (107).

[29] Ibid bk I ch 5 § 70 and generally §§ 65–81 (105–8).

[30] N Hammerstein, *Jus und Historie: Ein Beitrag zur Geschichte des historischen Denkens an deutschen Universitäten im späten 17 und im 18 Jahrhundert* (Vandenhoeck & Ruprecht Göttingen 1972) 62–71. See also N Hammerstein, 'Thomasius und die Rechtsgelehrsamkeit' in N Hammerstein (ed), *Geschichte als Arsenal: Ausgewählte Aufsätze zu recht, Hof und Universitäten der Frühen Neuzeit* (Wellstein Göttingen 2010) 245–68.

[31] See eg NH Gundling, *Ausführlicher Discours über die Natur und Völcker-Recht* (2nd edn Springs Frankfurt 1734) ch II §§ 18–19 (55).

[32] Ibid ch XXXIV §§ 18–36 (418 and generally 412–21).

[33] Ibid ch I §§ 40–2 (26).

[34] Ibid ch I §§ 69–73 (35).

[35] Ibid ch VI §§ 1–4 (96–7).

this properly. All humans were creatures of passion, and nobody more so than those who ruled the state. Despite the advice they may receive from their natural law counsellors, rulers will prefer to run after short-term benefits rather than wait for the realization of long-term interests.[36] Nations could therefore never trust each other but must be alert towards betrayals, breaches of treaties, and efforts to seize territory. To prevent this, natural law dictated the maintenance of the balance of power. Grotius, Gundling wrote, had allowed preventive action only if there was positive evidence of impending aggression. This was much too strict. Had anyone ever heard of a ruler who would have refrained from attempting conquest whenever he was convinced of his superior power? The balance could often be kept only by striking first; after all, '[o]ne cannot rule the world with *Pater nosters* or destroy one's enemies by *Ave Marias*'.[37]

Gundling collected the widest range of considerations to create a natural law with a realistic grasp on the operations of the state-machine: 'Nobody should think that acting in accordance with the laws is sufficient. Such a person still lacks that which is most important'.[38] As counsellors jurists needed state-wisdom ('*Staats-Klugheit*'): a clear view of the *interests* of their state and those of its neighbours. To enable princes to make such assessments, Gundling produced a work entitled *The Present Situation of European States* (1712, second edition 1733) as the first German study of comparative state-science that would extend beyond public law and into all aspects of the relations between neighbouring states.[39] This would include a description of the history, people, land, property, and climate of each state and the presentation would conclude in a statement of each state's 'State-interest'.[40] Gundling did not endorse a *monarchia universalis*, but not because he would not have valued the peace that it might bring. No prince would agree to give up his *jura majestica* for such a purpose and once it were established, it would sooner or later collapse in a general rebellion.[41] And so the work proceeded with a description of the principal European states—their history, territory, and resources, their industry and commerce, the character of the people and the patterns of rule, key institutions, the economy and the military resources plus, at the end, their 'interest' in the European state-system.

During the course of the eighteenth century, the natural law of nations came to encompass a comprehensive study of the government of early modern (absolutist) states. The universities of Halle and Göttingen produced an unparalleled stream of scholars and studies of public law and the law of nations that were historically and

[36] NH Gundling, *Einleitung zu wahren Staatklugheit, aus desselben mündlichen Vortrag* (Frankfurt und Leipzig, Springs 1751) ch VII (252).

[37] NH Gundling, *Erörterung der Frage: ob wegen der anwächsenden Macht der Nachbarn man Degen entblössen könne?* (Frankfurt 1757) §§ 4–6, 8 and 24 (4–6 and 19).

[38] *Einleitung zu wahren Staatklugheit* (n 36) ch I (22).

[39] NH Gundling, *Ausführliche Discours über den jetzigen Zustand Der Europäishecn Staaten. Vol I: Von dem Nutzen und Noth-wendigkeiten der Staaten-Notiz überhaupt* (Frankfurt 1733) at 2.

[40] Ibid 8. For an overview of the sources, see at 9–20, 23–4.

[41] Ibid 23–4.

empirically oriented and aimed to assist European rulers to bring about the security and welfare of their regimes.[42] The most famous eighteenth-century naturalist, Christian Wolff (1679–1754) even proposed a coherent system of natural norms to help the prince to bring about the 'perfection' of his nation. This perfection, he assumed, could be attained by drawing deductive inferences from metaphysical axioms at a high level of abstraction. The eight volumes of his *Jus naturae* (1740–8) extended into a general theory of property and contract, of private and public law, and concluded in the *Law of Nations* (1749) where Wolff extrapolated the rights and duties of states from the assumption that they existed like so many individuals in a state of nature. The most famous aspect of this construction was the view of states forming together a 'supreme state' (*Civitas maxima*) that had 'a kind of sovereignty' over individual states.[43] The natural law in this supreme state was either 'necessary'—the unchanging natural law that also applied between individuals—or 'voluntary'—derived from the consent of its members as a kind of 'fictitious' government of the world.[44]

Wolff's most well-known follower, the Swiss Emer de Vattel (1714–67), transposed Wolff's abstractions into the most widely used textbook of the law of nations in the late eighteenth century. The three-volume *Droit des gens* (1758) was a faithful elaboration on German natural law and went into much detail on the duties that public authorities had towards the security and welfare of their nations. The first book dealt with internal government, agriculture, commerce, education, and welfare. Public authorities, conceived as the nation's representatives, should 'apply to the business of providing for all the wants of the people, and producing a happy plenty of all necessaries of life with its conveniences, and innocent and laudable enjoyments'.[45] Through expounding the 'nation's duties to itself' Vattel aimed to reach the 'duty to humanity', politically realized in a specific territorial context. For it followed from the interdependence of nations that the security and happiness of one depended on the security and happiness of others and vice versa: '[a nation's] duties towards others depend very much on its duties to itself'.[46] If the duties of humanity were only imperfect and unenforceable (because there was no political organization of humanity), and the only perfect obligations were those that reflected the relationship between public authorities and the nation, then a law of nations with perfect, enforceable obligations must reflect the rights and obligations that governments had towards their citizens. This is why the only logical

[42] See *Jus und Historie* (n 30).

[43] C Wolff, *Jus gentium methodo scienitifica pertractatum* (JH Drake trans) (Clarendon Press Oxford 1934) prolegomena §§ 9–20 (13–17).

[44] Ibid prolegomena §§ 16, 19 (16–17).

[45] E de Vattel, *The Law of Nations* (B Kapossy and R Whatmore eds) (Liberty Fund Indianapolis 2008 [1758]) bk I ch 6 § 72 (126).

[46] Ibid bk I ch 2 § 13 (85).

place for Vattel to start was the elaboration of the duties that public authorities have towards the nation, to make Book One a treatise on good government.[47]

The second book dealt with the duties of the nation to others and the third with war. The duties of a nation to others consisted largely of derivations from the 'voluntary law of nations' that governed the most varied types of contacts from commercial to territorial and treaty relations, transmitting to the reader a sense of the contingencies of the environment in which states operated and the perspective from which public authorities should react to them. They, as Ian Hunter has pointed out, developed a 'diplomatic casuistry' of an almost endless 'array of "cases", "circumstances", and "occasions", in relation to which an open-ended series of "exemptions to . . . and moderations of the rigour of the necessary law" will be determined in accordance with national judgment and national interest'.[48] That professional diplomats found Vattel useful must have related to his appreciation of the difficulty of their task. That task required taking seriously an account of the differences that persisted among European nations, their size, resources, history, religion, and so on, as well as the variety of governmental tasks that befell authorities in different countries. Their policy—that is to say, the pursuit of their happiness and security—needed to be carefully measured by reference to their particular situation: 'such and such regulation, such or such practice, though salutary to one state, is often pernicious to another'.[49]

Vattel's law of nations opened a pragmatic, sociologically oriented study of how to act for the good of the nation, in view of its being part of a 'state-system'. It called for prudential statecraft. Again, however, it was unclear if public authorities could be trusted in this respect—they were notoriously gripped by 'disorderly passions, and private and mistaken interests'.[50] Moreover, nations were jealous of each other so that what had been originally constructed as an instrument of security and happiness—political statehood—was also a source of danger. How to check that danger, how to see to it that public authorities would not become a threat to the security of their neighbours required careful management of the balance of power that Vattel regarded as the legal basis of the European states-system. In principle, war was allowed only in case of actual or threatening injury to oneself.[51] Owing to the difficulty to make that determination, however, it was best to accept that if the belligerent parties were at least *claiming* to act in self-defence, then (although only one could be right), they should both be seen to act lawfully. And did 'threat' mean concrete military preparations (the

[47] See also S Beaulac, 'Emer Vattel and the Externalization of Sovereignty' (2003) 5 *Journal of the History of International Law* 237–92, at 256–9.

[48] I Hunter, 'Vattel's Law of Nations: Diplomatic Casuistry for the Protestant Nation' (2010) 31 *Grotiana* 108–40, at 125.

[49] *Law of Nations* (n 45) bk I ch 3 § 25 (91).

[50] Ibid bk II ch 1 § 16 (269).

[51] Ibid bk II ch 1 § 7 (265) and bk III ch 3 § 26 (483–4).

concentration of troops on the frontier, say) or did it extend also to the growth of the prosperity of a neighbour suspected of harbouring expansive designs? Vattel did not believe a clear answer could be given to such questions: 'men are under a necessity of regulating their conduct in most cases by probability'.[52] As for rulers who had 'already given proofs of imperious pride and insatiable ambition' the answer was clear. The decision to go to war against Louis XIV in the Spanish succession case had been undoubtedly right. History showed that growth of power often did indicate an aggressive purpose; it was rare for a state that had developed the capacity for victory to remain passive. Even a guarantee from neighbours would not always suffice; the security of the nation had to remain the predominant concern.[53]

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Written at the outset of the Seven Years' War (1756–1763), Vattel's *Droit des gens* summarized a century of teaching on the law of nations that looked for an exit from the recurrent cycles of violence in Europe by emphasizing the shared civilization and value of a political system where public authorities were assigned to work for the happiness and perfection of their nations. From Pufendorf to Vattel, those authorities adopted the Ciceronian precept according to which there was no essential contradiction between *honestum* and *utile*—the good and the useful—and assumed that by turning the attention of each nation to its own welfare and security, the welfare and security of everyone else would also be enhanced.[54] Such an optimistic view enabled leaving aside the frame—the further justification of European statehood—and instead concentrating on the basic techniques whereby a well-ordered polity would govern its internal and external affairs. From contemplating the state of nature or the histories whereby present states had emerged from it, the attention of *jus naturae et gentium* turned to the practical operation of the state-machines. What European jurists, diplomats, and men of affairs needed in the middle of the eighteenth century were technical instructions on how to make their nations prosper in security and friendly competition. This required believing that natural law would enable the operation of a progressive system of interests that, Carl Becker once ironically remarked, resembled the 'heavenly city' of medieval theologians to which eighteenth-century thinkers looked '[w]ith eyes uplifted, contemplating and admiring so excellent a system, they were excited and animated to correspond with the general harmony'.[55]

[52] *Law of Nations* (n 45) bk III ch 3 § 44 (493). [53] Ibid.

[54] E de Vattel, 'Dialogue of Prince and His Counsellor' in *Mélanges de literature, de morale et de politique* (B Kapossy and R Whatmore eds) (Liberty Fund Indianapolis 2008) at 87.

[55] C Becker, *The Heavenly City of the Eighteenth-Century Philosophers* (2nd edn Yale University Press New Haven 2003) at 63.

4 Transformation of Natural Law I: Into Economics

Natural law was rooted in eighteenth-century German politics as a justification of the post-Westphalian territorial settlement. Recourse to the state of nature produced a historical explanation for the state as an instrument of the security and welfare of those households whose heads had, in exchange, subordinated themselves to its superior power. This prompted teachers of *jus naturae et gentium* to develop their science into an empirical state-technique (*Staatskunst*) and a quasi-Machiavellian state-wisdom (*Staats-klugheit*) that elaborated the technical means of what would be needed to realize the interests of what, towards the end of the century, came increasingly to be articulated as 'civil society'.[56] Another follower of Wolff with a keen interest in this process was JHG Justi (1717–1771) who moved between courts in Austria and Germany giving administrative advice and publishing a large number of volumes whose topics ranged from the management of the royal *Kammer* to upholding good order (*Gute Policey*), the nature of statehood and the 'chimera of the balance of power'.[57] In his 'political metaphysic', Justi adopted the Wolffian frame of statehood as an instrument of social 'perfection'. With the help of the metaphor of the state as a 'machine', he presented government as the technical production of the happiness of civil society.[58] Justi had imbibed the view of state power as above all economic wealth and wealth-creation as a matter of private initiative and industriousness. He even argued that one of the objectives of statehood was 'freedom', by which he meant both the state's independence from outside powers and the citizen's economic liberty, both conceived as aspects of governmental policy.[59] In the 1770s and 1780s, the translations of the French Physiocrats and Adam Smith began to circulate in Germany. At this time, Justi concluded that it was no longer possible to rule the state only by lawyers—one needed 'universal cameralists', men who would be knowledgeable about the operation of the private economy and the resources of

[56] M Riedl, 'Gesellschaft, bürgerliche' in O Brunner, W Conze, and R Koselleck (eds), *Geschichtliche Grundbegriffe* (2 vols JG Cotta Stuttgart 1975) vol 1, at 748–71.

[57] For biographies, see U Adam, *The Political Economy of JHG Justi* (Lang Oxford 2006) at 23–54; M Obert, *Die naturrechtliche 'politische Metaphysik' des Johann Heinrich Gottlob von Justi (1717–1771)* (Lang Frankfurt 1992) at 7–23; K Tribe, *Governing Economy: The Reformation of German Economic Discourse 1750–1840* (CUP Cambridge 1988) at 56–61.

[58] JHG Justi, *Natur und Wesen der Staaten als die Quelle aller Regierungswissenschaften und Gesetze* (Mitau Steidel 1771 [1760]) ch 3 §§ 30–44 (61–95). See also EP Nokkala, 'The Machine of State in Germany—The Case of Johann Heinrich Gottlob von Justi (1717–1771)' (2009) 5 *Contributions to the History of Concepts* 71–93.

[59] See eg JHG Justi, *Der Grundriss einer guten Regierung* (Garve Frankfurt 1759) Einleitung §§ 32 and 34 (20–2); *Staatswissenschaften* (n 16) 233.

the state as a whole.[60] Justi's writings had already defined the political power of a state as a combination of the wealth of private families and efficient statecraft, taking seriously the existence of a realm of private commercial exchanges that operated best without excessive interference by public power.[61] Unlike many of the older generation of naturalists, Justi regarded commerce in luxury as welcome because it would contribute to the emergence of a wealthy merchant class that would then be emulated by the rest of the population. Indeed it was one of the objectives of the state 'to have rich and powerful merchants'.[62] He advocated the removal of monopolies, guilds, and other restrictive provisions in all other cases apart from protecting the initial operations of large investments. He was, however, critical of trade companies and the associated monopolies and celebrated the dismantling of the Danish West India Company in 1764.[63]

The central metaphor for dealing with international relations in the eighteenth century was the balance of power. Owing to the way it connoted a concrete, almost physical process, it fitted well with naturalist ideas about ruling the state-machine. At this time, jurists were conscious that the power of the state meant not only its military resources but above all its economic wealth, in part a function of domestic production, in part of external trade. In the course of the Seven Years' War, Justi attacked the proposal by the French minister Jean-Henri Maubert de Gouveste that the balance of power ought also to be extended to balance of *trade*, to be regulated as part of European public law. In the *Chimera of the Balance of Power in Commerce and Shipping* (1759), Justi emphasized the impossibility, irrationality, and injustice of the proposal. True, the argument from 'balance of trade' was a logical extension of the view that state power was above all commercial power. But it flew in the face of the realization that it was the nature of commerce to be free. Every nation tried to export as much of its excess product as it could and to buy what it needed from whomsoever was willing to sell at the lowest price.[64] Success in international commerce depended on the industry and skilfulness ('*Arbeitsamkeit und Geschicklihckeit*') of the population and growth of power followed naturally from the expansion of commerce. It would be unnatural and ridiculous to try to limit the way nations traded to pursue their happiness.[65] The effort by the French minister to rally European nations against England under the principle of the balance was, Justi argued, merely a hypocritical effort to dress France's military interests in the garb of a principle of European law.

Interest in empirical statecraft, *cameralism, Policey*, and, ultimately, *oeconomia*, arose quite logically from a basic turn undertaken in German and more generally

[60] *Governing Economy* (n 57) 67.

[61] *The Political Economy of JHG Justi* (n 57) 194–9.

[62] JHG Justi, 'Abhandlung von denen Manufakturen und Fabriken I-II (1758/61)', cited in *The Political Economy of JHG Justi* (n 57) 199.

[63] *The Political Economy of JHG Justi* (n 57) at 208.

[64] JHG Justi, *Die Chimäre des Gleichgewichts der Handlung und Schiffahrt* (Altona 1759) at 11–21.

[65] Ibid 27. See further *The Political Economy of JHG Justi* (n 57) 82–92.

European legal and political thought in the eighteenth century.[66] Because natural law in Germany was above all a university discipline, the turn was immediately manifested in the struggle of the faculties, a constant of German academic life. As long as natural law was taught at the philosophy faculty, its expansion into such other areas would be encouraged by rethinking the relations between Aristotelian ethics, politics, and *oeconomia* within practical philosophy. In the law faculty, however, *cameralism* and *Policey* remained cantoned in the theory of statehood and the international world mediated by the natural law tradition. But the prevalence of jurists as experts of statecraft could not last forever.[67] In the last years of the eighteenth century Immanuel Kant's teaching began to penetrate German natural law. This meant a significant turn to individual rights ('*Menschenrechte*') and an effort to redefine the teleology of statecraft as being above all about the security of civil society, the protection of property, and seeing to the functioning of the economic market.[68] With this, the basic ingredients were in place for the shift of attention from *Staatswirtschaft* to *Nationalökonomie*:

> . . . the principles that Smith advanced were integrated with the redefinition of social order that arose from the reform of Natural Law, a reform which also implicated a separation of the State and civil society.[69]

The expansion of the focus of governmental science from the state to the operation of the economy as a whole created the demand for novel kinds of governmental expertise—a call met by the creation of the first faculty of public economy at the University of Tübingen in 1817.[70] In a sense, when natural lawyers realized what they needed to become in order to fulfil the promise they had made to their clients, the rulers, and the governmental decision-makers, they understood that they needed to become economists.

5 Transformation of Natural Law II: Into Philosophy

Neither the Wolffian abstractions nor the empirical-utilitarian turn in natural law took place without criticisms. In the *Critique of Pure Reason* (1781/1787) and

[66] I have sketched the way it took place in France in M Koskenniemi, 'The Public Law of Europe: Reflections on a French 18th Century Debate' in H Lindemann et al., (eds), *Erzählungen von Konstitutionalismus* (Nomos Baden-Baden 2012) 55–63.

[67] *Staatswissenschaften* (n 16) 288–9.

[68] See especially W von Humboldt, 'Über die Sorgfalt der Staaten für die Sicherheit gegen auswärtige Feinde' (1797) 20 *Berlinische Monatsschrift* 346–54.

[69] *Governing Economy* (n 57) 175.

[70] Ibid 177–9.

later works on law and morality, Immanuel Kant (1724–1804) attacked both in a way that gradually made it impossible to continue natural law in the traditional vein. Against the rationalists, Kant argued that pure, abstract reason failed to grasp its own situatedness in the world and either left its axioms hanging in the air or defended them in a circular manner. These abstract systems produced nothing that was not put into them from the outside; yet they had no way of dealing with that outside—the 'thing in itself'—to which they therefore had a profoundly *uncritical* attitude.[71] The theory of the *Civitas Maxima* illustrated precisely the kind of *Weltfremd* utopia into which purely logical reasoning would lead; an incident of the hubris of pure reason. But the world's problems cannot be resolved by it. Any attempt to do this would first produce absolutism and then tyranny—'a soulless despotism [that], after crushing the germs of goodness, will finally lapse into anarchy'.[72] It will have to remain up to humans themselves to *choose* the way they are governed. Hence, as Kant stressed, the failure of reason to meet its own demands was ultimately 'fortunate . . . for the practical interests of humanity'.[73]

But civil philosophers who regarded the task of reason as being merely to align itself with the conditions of empirical existence fared no better in Kant's eyes,[74] or, as he put it in *Perpetual Peace*, their 'philosophically or diplomatically formulated codes do not and cannot have the slightest *legal* force'.[75] It was not only that there existed no way of constraining states. The very idea of drawing norms out of empirical facts—whether the Hobbesian fact of innate hostility or the Grotians' sociability—was fundamentally misconceived. The principles on which civil philosophy built its view of natural law were indeed derived from the 'close scrutiny of the nature and character of man', human history and action.[76] But the resulting notions of 'self-love', 'human animal', 'will', and 'happiness' were *too firmly* embedded in a view of humans responding mechanistically to natural inclinations, activated in response to external stimuli. In the debates over the nature and direction of the enlightenment in Germany, Kant's aim was to vindicate the view of the human being as 'more than a machine'.[77] The key question for Kant was not at all

[71] On what Kant calls the 'antinomy of pure reason', see I Kant, *Critique of Pure Reason* (P Guyer and AW Wood trans and eds) (CUP Cambridge 1998 [1781/1787]) at 466–95 [A420/B448]–[A460/B488].

[72] I Kant, 'Perpetual Peace: A Philosophical Sketch' in *Kant: Political Writings* (H Reiss ed HB Nisbet trans) (2nd edn CUP Cambridge 1991) 93–115, at 113. This is Kant's most extreme characterization of a world state. In other places, he shows much more sympathy to it. For example, in the 'Second Definitive Article', he regards it as a thesis necessitated by the same reason that compels humans to join in a state—but unrealizable owing to this being 'not the will of nations': at 105.

[73] *Critique of Pure Reason* (n 71) 342 [A463/B491].

[74] Ibid 345–7 [A469/B497]–[A473/B501].

[75] 'Perpetual Peace' (n 72) 103 (emphasis in original).

[76] *On the Duty of Man and Citizen* (n 4) bk I ch 3.

[77] I Kant, 'What is Enlightenment?' in *Kant: Political Writings* (n 72) 54–60, at 60.

'how to be happy but how we should become worthy of happiness'—a distinction that humans may not always honour, but that they routinely made.[78] In assimilating human beings as parts of (passive) nature, the civil philosophers left no room for human society as distinct from nature, a realm in which legality would uphold everyone's freedom.

Having demolished both available forms of natural law as intellectual enterprises Kant developed his own view of international law that was published in 1795 as the philosophical sketch of *Perpetual Peace*. Here, as is well known, Kant differentiated between three types of law. First, he maintained that the constitution of every state should become 'republican'. This was necessary because freedom could only become a reality where a lawful constitution regulated the rights of citizens vis-à-vis each other. Second, he argued that international law should take the form of a 'federation of free states' that would rule themselves under laws and a jointly agreed federal constitution. And finally, he canvassed the presence of a 'cosmopolitan law' that would entitle individuals to move about freely in the world under conditions of universal 'hospitality'.[79] The proposal was drafted in a gradualist fashion and was accompanied by a series of preliminary actions that, Kant suggested, ought to be carried out as preconditions for stable peace. It also included proposals about the relations of politics and morality and the role of philosophers in government: 'The maxims of the philosophers on the conditions under which public peace is possible shall be consulted by states which are armed for war'.[80] But the ultimate success of policy would nevertheless depend on the moral regeneration of the ruling class.[81]

Although *Perpetual Peace* was received with some interest in Germany and France, it had no actual effect on European diplomacy or the development of the law of nations during or after the French revolution, the context of its publication. Despite its gradualist nature, it was rejected even by sympathetic admirers as perhaps attractive in theory but unworkable in practice, a figment of a scholar's imagination. Some, such as the 'popular philosopher' Christian Garve (1742–1798), argued that it was a mistake to suppose that statesmen could or should operate with principles derived from private morality. They were responsible for the fate of large populations and could not be expected to be overly concerned for the purity of their souls.[82] Others, such as Friedrich

[78] I Kant, 'On the Common Saying: "This May Be True in Theory But It Does Not Apply in Practice"' in *Kant: Political Writings* (n 72) 61–92, at 64 and 68–72.

[79] 'Perpetual Peace' (n 72) 105–8.

[80] Ibid (n 72) 115 ('Second Supplement: Secret Article of Perpetual Peace').

[81] I Kant, 'Perpetual Peace: Appendix I: On the Disagreement between Morals and Politics in relation to Perpetual Peace' in *Kant: Political Writings* (n 72) 116–25.

[82] C Garve, *Abhandlung über die Verbindung der Moral mit dem Politik oder einige Betrachtungen über die Frage in wiefern es möglich sei die Moral des Privatlebens bei der Regierung der Staaten zu beobachten* (Korn Breslau 1788).

Gentz, doubted the ability of nature to provide lessons for politicians and rejected the view that a federation could be maintained on purely reasonable grounds and without overwhelming force. Like most commentators, Gentz accepted that despite its precarious nature, there was no alternative to the balance of power.[83]

In the stream of post-Kantian texts on the law of nature and of nations, none would have a similar influence to those of Thomasius or Wolff. A typical work in the new genre of 'rights of humanity' was the 1792 volume by the Erlangen philosopher Johann Heinrich Abicht (1762–1816) that deduced a full conception of law from the 'absolute' and 'conditional' rights of human persons that was emptied of references to both contemporary practice and history. Autonomy was essential and it was realized in society by *Selbstverpflichtung*—voluntary submission to laws designed to make possible social life among free persons.[84] Abicht's law of nations was based on the 'general rights of each people' ('*allgemeine Rechte eines Volks*').[85] Like Gundling, Abicht extrapolated the rules of the law of nations from what he thought was desirable among individuals in the natural state. But he had none of the latter's' sensitivity to the dilemmas of politics and his discussion remained an abstract celebration of the rights of diplomacy and treaty-making with wholly unrealistic views on just war as enforcement.[86] The proposal for a permanent court of nations to develop the law and to decide disputes on the basis of criteria 'derived from the rights of humanity' may well have fitted a jurisprudence class but had not the slightest chance of becoming reality.[87]

Natural law teaching continued in German law faculties even after Kant's devastating critiques but was henceforth largely integrated with 'legal philosophy'. It did provide a platform to debate propositions such as those by Fichte on the closed commercial state or Hegel on world history being the world tribunal. But these were less intended for the use of diplomats than parts of a novel genre of social philosophy whose major interest resided in reflecting about conditions of human freedom that were quite distant from the daily politics of statehood. As idealist philosophy, natural law would continue to exist as a respectable aspect of legal education that, however, would no longer claim to offer young jurists an opening to positions in government or diplomacy.[88]

[83] F Gentz, *De la paix perpetuelle* (MB Aoun trans) (CNRS Paris 1997 [1800]) at 66–70.

[84] JH Abicht, *Neues System eines aus der Menschheit entwickelten Naturrechts* (Erben Beyrouth 1792) at 31–3.

[85] Ibid 525. [86] Ibid 541. [87] Ibid 550.

[88] D Klippel, 'Naturrecht als politische Theorie. Zur politischen Bedeutung des deutschen Naturrechts im 18 und 19 Jahrhundert' in HE Bödeker and U Hermann (eds), *Aufklärung als Politisierung—Politisierung der Aufklärung* (Meiner Hamburg 1987) 267–93, at 277–82.

6 Transformation of Natural Law III: Into Diplomacy

Following Pufendorf, eighteenth-century German jurists assumed that the principal field for the practical application of natural law were relations between nations. Sovereigns lived in a state of nature and the rules governing their relationships emerged from what was taught by wise statecraft contemplating the attainment of state purpose (*Staatszweck*). This did not mean that they would have viewed the international world as one of endless war. In a competitive and sometimes dangerous world it was possible to agree on reasonable principles that operated for the benefit of all. Division of labour in production and commercial exchanges was one such technique, the balance of power another. Natural law gave articulation to both as mechanisms, indeed almost automatons, that would bring about the desired harmony between *utile* and *honestum*. In the routines of statecraft, this would take place through the turn to economics; as thinking about the frame, it would support a philosophical orientation towards the needs and rights of the individual subject.

The transformation of natural law into economics and idealistic philosophy did not, however, undermine the historical practices of European treaty-making or diplomacy, or the view that this world, too, formed a 'system' in need of its experts. In the 100-page Introduction to his *Droit public de l'Europe* (1758)—a collection of treaties from the Peace of Westphalia onwards—Abbé de Mably put forward a 'science of negotiations', a proposal taken up by the last important representative of the Göttingen school, Georg Friedrich von Martens (1756–1821), as the heart of his effort to turn the law of nations into a ('positivist') science of European diplomacy. For his first lectures, Martens published his own textbook of international law, the *Primae liniae juris gentium Europaearum Practici in usum auditorum adumbratae* (1785), thereafter reproduced in one German and three French editions during his lifetime.[89] The work was written as a handbook on the practices of European diplomacy, to be used in connection with teaching future state officials the workings of European public law. Its notion of law was that of a technical craft that

[89] GF von Martens, *Primae liniae juris gentium Europaearum Practici in usum auditorum adumbratae* (Dieterich Göttingen 1785). The German version came out in 1796 as *Einleitung in das positive europäische Völkerrecht auf Verträge und Herkommen gegründet* (Dieterich Göttingen 1796). The French versions came out as *Précis du droit des gens moderne de l'Europe fondé sur les traités et l'usage* (Dieterich Gottingue 1789, 1801, 1821). Below, most references are to the 1801 edition. After his death two additional French versions came out and the book was translated also into English at the request of the United States government (1795). For details, see W Habenicht, *Georg Friedrich von Martens: Eine Biografische und völkerrechtliche Studie* (Vandenhoeck & Ruprecht Göttingen 1934) at 58–9.