Introduction

It seems at times as if we have lost sight of what international law is. Yes, it is true that an incredibly vibrant contemporary debate about international law is now spreading to all disciplines,[1] but we fail to think enough about its purposes and so we are missing the point about international law. What is the meaning of it? What is it for? Why did it come about? Why has it come to have the scope that it has? Is its current development certain to continue? Ongoing debates within the discipline itself focus on technical matters and issues about systems, effectiveness and legitimacy, important and necessary as they are; but in doing so they partly cloud the question of what are the meaning and the ends of international law. My objective, therefore, has been to go back over the history of the purposes of international law so as to take a fresh look at the point behind it all. I have chosen to start out from the beginnings of international law in the modern era in order to get an understanding of some of the most decisive thinking behind it and so move into a position from which to think through the meaning of contemporary international law.

The rules of international law are means directed at concrete or symbolic ends; they are tools that can be used for various changing purposes. But among all those purposes it does seem that there has always been a twofold ultimate purpose: to be a liberal-welfarist law. International law has classically been held up as liberal law ensuring the co-existence of states and co-operation among them; but in fact from the outset it has also been welfarist law. Ever since it first emerged as an autonomous body of law in eighteenth-century Europe it has made a place for itself in international society as a whole (first in Europe and then worldwide), not just by catering for the concerns of states and their preoccupation with stability in order to protect their sovereign freedom, security and interests;

[1] For ways of handling the history of international law: see Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.), *Time, History and International Law* (Leyden: M. Nijhoff, 2006).

it has also been considered a form of 'welfare', a right of intervention intended to secure the happiness and well-being of the world's peoples. Hence, since its beginnings, international law has provided a secularized eschatological model that continues to shape our world without our realizing it. International law has obviously satisfied some quite practical concerns but it has also fulfilled a much deeper and broader expectation, the scope of which should not be underestimated: legal scholars believed that it held the key to the salvation of humankind, a key that was close to, but different from, religion, morals, politics, economics and even metaphysics.

Why is this so and why has international law manifested itself in this twofold form that endures in contemporary times? Simply because international law, as it has come down to us, arose in Europe in the modern period at a time when theology was ceasing to provide structure to society, but when society was still steeped in Judeo-Christian culture. The law of nations was to be a product of that culture and was to become one of the new mainstays that were to impart meaning and pattern to human destiny. In other words, it too is one of the many outcomes of the modern secularizing movement that swept Europe from the sixteenth to the eighteenth centuries. And without being so radical as to make it out to be a secularized theology, I seek to show that its purposes are in part the legacy of both scholastic theology and, above all, of the Protestant Reformation. The idea itself is straightforward enough and almost trite; but it has not been taken far enough for the law of nations, which was after all one of the most compelling intellectual constructions of the modern era. Now, by reasoning in this way, we gain insight into the meaning of international law from its origins in the modern period up until the present day.

The actual terms 'welfarist international law' and 'liberal international law' are comparatively new to international law, at least the first one is; but all the same they are intended to convey something of both past and present forms of international law. Labels can be misleading and attempts at labelling can be something of a lottery, so definitions that are not sharp enough may prevent a ready understanding of the terms 'liberal international law' and 'welfarist international law'. The main difficulty is that I have taken terms that are ordinarily used for internal affairs. The terms 'liberal' and 'welfarist' are coupled here with 'law' rather than with 'state'. The liberal state, like the welfare state, are commonplace notions nowadays. The rarer 'liberal law' and 'welfarist law' can be readily associated with them in that they refer simply to the legal practices and systems deriving from the liberal or welfarist conceptions of the state. But

if we turn to the international arena to characterize international law in this way, it is plain that the meaning of the terms 'liberal' and 'welfarist' are now detached from the state, since there is no world state but merely international society; and it is equally plain that the labels 'liberal' and 'welfarist' are directly attached to international 'law' alone.[2] However, it seems to me that this transposition – which is very common in the Anglo-American world for liberal law – is fully warranted, because of the constant projection of politics into the international sphere and because what is under consideration is not a single state but the power-based relations among states. There is no reason why we should not and, on the contrary, every reason why we should think of these terms by analogy with what is said and done in domestic affairs and what is said and done in international affairs; but for all that without denying what it is that makes 'liberal' and 'welfarist' international law specific. The terms should not be ignored, then, but on the contrary should be widely broadcast.

In choosing these terms I have resorted to what Paul Veyne calls 'conceptualizing history' as opposed to mere 'event history'.[3] These are 'concept terms' that are given precedence over the ordinary traditional categories of international law scholarship because they provide a suitable instrument for interpreting a historical reality that hitherto felt uncomfortable or strange.[4] Besides, the multiple meanings of the words 'welfare' and 'liberal' are useful as a number of those meanings can be bundled together to capture the ambivalence of the reality in question. The terms are also used for practical purposes, that is, I do not seek to describe an idea of liberal-welfarist international law as some sort of *a priori* postulate of what international law is, and then seek out actual manifestations of it. I have tried instead to come up with a concept that is a generalization of a whole series of facts, an operative and pragmatic concept, that is intelligible in itself in

[2] This is not, then, about investigating what is happening to liberal states and welfare states because of contemporary international law or today's globalization, but about highlighting the complex and manifold nature of international law which is *itself* both liberal and welfarist. For that first type of investigation see, for example, Ramesh Mishra, *Globalization and the Welfare State* (Cambridge University Press, 1999) and Eyal Benvenisti and Georg Nolte (eds.), *The Welfare State, Globalization, and International Law* (Berlin: Springer-Verlag, 2004).

[3] Paul Veyne, 'L'histoire conceptualisante', in Jacques Le Goff and Pierre Nora (eds.), *Faire de l'histoire* (Paris: Gallimard, 1986), vol. 1, p. 64. Already presented and illustrated by Paolo Napoli, *Naissance de la police moderne* (Paris: La découverte, 2003), p. 11, whose analyses are taken up here. On the use of contemporary concepts for designating past realities, see Reinhart Kosellek, *Le futur passé. Contribution à la sémantique des temps historiques* (Paris: EHESS, 1990), pp. 115 ff.

[4] Napoli, *Naissance de la police moderne*, p. 11.

the light of the discourse and practice of international law past and present, and that at the same time generalizes actual historical experience.[5] What matters above all in the choice of terms is to try to provide a comprehensive response to the uneasiness felt with the overly narrow or trite meanings of international law of yesterday and today. Those meanings tend to keep us locked into the same mindsets and have partially screened from view the meaning and the purposes of international law.

In truth the term 'welfarist international law' is the newer one and so the one that needs to be clarified from the outset. This welfarist international law, which is highlighted in this book, has obviously never been, and is still not, welfare law based on a system of insurance or of redistribution of wealth in the form of benefit payments among states. The welfare dimension of welfarist law remains confined to municipal laws (or to certain aspects of private international law) and, because of the specific structure of international society, emerges only incipiently in public international law. By welfarist international law, I mean, then, another form of welfarist law in the same way that there is more than one form of welfare state. This welfarist law is close to what Richard Titmuss calls a residual welfare state or what Gosta Esping-Andersen calls a liberal welfare state.[6] As such, its features are much broader than a welfare law and date from much further back. As I shall try to show, it corresponded originally to a whole set of eighteenth-century interventionist ideas and legal practices in which utility, happiness, the common weal and the material and moral betterment of peoples were the purpose of law. Accordingly, the purpose of welfarist law was plainly something other than the merely liberal purpose of law. While welfarist international law is interventionist and looks to tip the socio-economic balance of international society, to succour peoples, to ensure their well-being and to stave off poverty, misery and ignorance, liberal international law looks to guarantee the sovereign freedoms of states and to ensure their security by allowing states to exercise their rights in the broadest way. In short, whereas welfarist law is a law of intervention, liberal law is a law of simple regulation; whereas welfarist law is designed to bring about good, liberal law is designed to maintain states' freedom. However, as will be seen in the final part of this book, the liberal purpose is currently split in a way

[5] Napoli, *Naissance de la police moderne*, p. 12.

[6] Gosta Esping-Andersen, *Les trois mondes de l'Etat-providence. Essai sur le capitalisme moderne* (Paris: PUF, 1999), pp. 21 ff and Richard Titmuss, *Commitment to Welfare* (London: Allen & Unwin, 1968), pp. 5 ff.

that shifts these meanings somewhat, making the dividing line between them more permeable.

This history, then, has three objectives.

First, it is made clear that certain standard ways of presenting international law historically in Europe are not wrong, but they overlook the full political and ideological significance of what international law was and is. There is sometimes a stated apolitical neutrality in the actual historical presentation of international law indicative of a more or less conscious desire to depoliticize international law. This is part of an implicit positivist ambition to reduce international law to a mere technique or to deduce it solely from its 'own genius' or from simple structural conditions. There is also a stated aim to differentiate fully between internal and international orders and so to break with the old ideas of an analogy between these separate types of legal order. Conversely, while being aware of the specific structural features that explain international law, in emphasizing the dual liberal and welfarist purpose of international law I seek to highlight the political visions that lie behind international law. There have always been political visions that have shaped the rules of international law in line with the most commonplace and the most concrete realities, but also in line with the utopias, beliefs and passions of politicians and international jurists. In some sense the welfarist purpose of international law throws a starker light on this political vision, since welfarist law is interventionist and inegalitarian law and is not merely a curb on the exercise of states' sovereign freedom; welfarist law therefore appears from the outset (but appearance is all it is) to be less neutral than liberal law and makes its political dimension more readily perceptible, since to ensure well-being, to fight against disease, ignorance and poverty, to ensure the flourishing of individuals and peoples, their protection, their general utility and their happiness, it is to be employed deliberately in favour of certain members of international society and to the detriment of others, willingly or unwillingly, out of a duty to improve, civilize or act humanely, inclusively or exclusively. This history, then, looks to bring out this political aspect of international law through the study of its purposes; it looks to underscore the very close connection there has always been between political ideas internally and internationally; it looks to emphasize the way in which international lawyers and politicians have projected their home-grown ideas onto the international scene – and thereby to point up also the parallel development of the internal and international orders.

Along similar lines, this history unsurprisingly relates liberal-welfarist international law to the modern Western world, which has constantly

projected its values and its political aspirations onto the international legal system past and present. Even if the two are not to be conflated, international law has always had its share in the exercise of what one might very broadly call international political power. Ever since the modern age, it has governed a world of tremendous disparities in power and wealth and it continues to govern a pluralistic, non-homogeneous international society where resources are unequally distributed among states and where peoples and individuals have unequal endowments of wealth, freedom and well-being. The Western belief in the force of international law was enrolled in the service of an appalling imperialistic and colonizing political ambition, whereas the European liberal-welfarist project of the Moderns was about a hope for the emancipation of states and for the happiness of their peoples: a tragic ambivalence that needs to be understood and assumed once and for all from both Western and Eastern standpoints rather than believing it can be ignored, as did Western historiographers of international law of the classical age, or rather than seeking constantly to denounce it and slipping into radical anti-Western ways that deliberately ignore its original emancipating characteristics. This history, it is hoped, then, will also avoid overly simplistic images and readings for West and East alike.

The narration of a history of liberal-welfarist international law is intended, secondly, to highlight the economic realities and theories that have underpinned this kind of law from the mercantile and physiocratic practices of the eighteenth century through to the latest post-Cold War economic globalization. The political and economic dimensions of international law are closely intertwined, and the existence of a liberal-welfarist international law presupposes a more complex underlying representation than might be thought between law and politics, on the one hand, and economics – and so the production and circulation of goods and services – on the other. It remains obvious, though, that liberal-welfarist international law has generally managed so far to come to terms with the persistence of a broadly capitalistic or market-based world structure whatever the changes greater legal interventionism might have implied.[7] Moreover, the question of the relationship between international law and economics is a crucial one. It now gives rise to an unsolved contemporary

[7] As Pierre Rosanvallon has shown, modern history – of which the history of international law is a part – is also the history of the modern market, a point that obviously cannot be overlooked. See Pierre Rosanvallon, *Le libéralisme économique. Histoire de l'idée de marché* (Paris: Seuil, 1989).

query as to whether law is not in the service of (public and private) economics, whether world economic and financial power – whatever its many forms – has come to a point where it is not controlled in any way by law and politics and whether the liberal and welfarist dimensions reflect it, regulate it or counterbalance it. The impact of this on the question of purposes is plain enough: what are the means and what are the ends? Is what should be a liberal political end of international law not also the means of a certain form of economics? Or, when it was operational, did not the welfarist dimension of international law allow some alignment of the world economy and domestic economies?

Thirdly, this history seeks to emphasize that international law is neither narrowly welfarist law nor narrowly liberal law, but that it is indeed *liberal-welfarist* law and that one of the keys to its meaning lies in the conjunction of these two purposes. There are dialogic ties, that is, both antagonistic and complementary ties, between the liberal and welfarist purposes of international law. This dialogic aspect of the purposes of international law should not come as a surprise, since this law is originally a product of European thought and European thought is itself dialogic and not synthetic. As Edgar Morin showed so very well, what makes for the unity of European thought is not the synthesis of its principles, but the continual interplay among competing and complementary principles derived from Jewish, Christian, Greek and Roman traditions, each with its own logic.[8] This dialogic dimension is very plain in the original co-existence of the two opposing purposes of international law that continues to this day. And when all is said and done it is a fascinating historical alliance combining as it does two terms that still seem contradictory, whereas historically they have always been complementary. In each of these two purposes, in each of the legal regimes they engender, we find both what opposes one to the other and what completes each of them, held in a state of tension that remains incompletely resolved. This state of tension explains the recurrent oscillation down the centuries of the tasks, practices and legal discourse relating to international law. It explains the multiple functions of international law and the diversified use of its rules and concepts. It provides insight into some of its fundamental paradoxes. It also explains one of the sources of both resistance and attraction to international law of Western origin. Despite the very keen contestation to which it is regularly subjected, international law basically unites in its

[8] Edgar Morin, *Penser l'Europe* (Paris: Gallimard, 1987), p. 28 and *Introduction à la pensée complexe* (Paris: Ed. ESF, 1990), p. 99.

two purposes the intersecting and diverse expectations of all concerned, because its liberal dimension reflects respect for all forms of freedom and sovereignty while its welfarist dimension allays the economic and social risks that may arise from the exercise of freedom and sovereignty.

The argument developed in this book is built upon a specific hypothesis: it is precarious and above all it does not seek to fix *the* meaning of international law once and for all. It is certainly not a matter of saying that its past and present history comes down to the dual existence of these two purposes. Dualism in thought sets traps that have been well enough flagged for international law not to be dogmatically reduced to this double liberal-welfarist dimension. I aim, then, merely to broaden the range of current historical interpretations through a historical reading that is more often complementary to other histories rather than opposed to them. This history is also deliberately eclectic, interweaving doctrinal, academic and factual points. And it is selective because it aims to bring out only certain aspects, certain specific challenges of contemporary and past international law, to the extent that, for example, I shall barely touch upon the issue of the law of war and peace. So this is not a historian's history that endeavours to cover the entire historical field of international law and to meticulously reconstruct the past,[9] it is instead a history that wishes to open up avenues of thought to try to provide keys to understanding the meaning of our current international law by putting a new slant on a legal process that still escapes us today. In that, it is as much a history of the present time as of past time, as much a history of contemporary international law as of international law of the past.[10]

This book is organized along very simple lines. Its parts are merely landmarks in a general line of argument. They break international law down into periods, but this division remains contingent and the periods selected indicate only relative changes. The overall idea has been, though, to put substance before form by following what is deliberately the most straightforward and classical of time lines so as not to lead readers astray out of concern for aesthetics or form. Accordingly, the development of liberal-welfarist international law is studied in its successive forms of the modern law of nations (Part I), classical international law (Part II) and contemporary international law (Part III).

[9] See Alain Renaut, *L'ère de l'individu. Contribution à une histoire de la subjectivité* (Paris: Gallimard, 1989), pp. 11 ff.

[10] On the idea of history of the present time see Henri Rousso, *Histoire, critiques et responsabilité* (Paris: Ed. Complexe, 2003) and A. Chauveau, *Questions à l'histoire du temps présent* (Paris: Ed. Complexe, 1999).

PART I

The modern law of nations