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Introduction

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Since the 1960s and more particularly since the end of the Cold War, interest in the history of international law has greatly increased among international lawyers and legal historians alike.[1] Nevertheless, as an academic discipline, it is still lagging behind compared to most other branches of legal history. Recent efforts cannot be expected to make up for the neglect the field has suffered during most of the past two centuries.

The causes of the traditional neglect of the history of international law are many and much debated.[2] Paramount among them is – or was? – the dominance of national states and national law. This caused lawyers and legal historians to concentrate on internal legal developments. Moreover, in the heyday of state sovereignty, the binding character of public international law came to be disputed or even denied, which surely caused legal historians to turn away from its study.

Notwithstanding the efforts of many scholars from all over the world during recent decades, the study of international law is still lagging behind the field. Fundamental methodological questions have not been answered or even seriously debated.[3] Most of the sources – even the most important ones like treaties – still await modern, critical editions. The vast majority of recent scholarship still tends to concentrate, as it has been the case before, on doctrine and not on legal practice. And above all, most of the endeavours of recent years have been individual. There have hardly been any sustained, coordinated efforts, nor is the field organised.

Two initiatives – which saw the light of day in the late 1990s – have brought some change in that last respect. At the Max Planck Institute for

[1] Ingo Hueck, 'The Discipline of the History of International Law', *Journal of the History of International Law* 3 (2001), 194–217.

[2] See on the causes of this neglect: Johan W. Verzijl, 'Research into the History of the Law of Nations' in *International Law in Historical Perspective* (Leiden, 1968), vol. I, pp. 400–34.

[3] Wolfgang Preiser, *Völkerrechtsgeschichte: ihre Aufgaben und Methoden* (Wiesbaden, 1964); Heinhard Steiger, 'Probleme der Völkerrechtsgeschichte', *Der Staat* 26 (1987), 103–26.

European Legal History in Frankfurt a research project was set up under the leadership of Ingo Hueck on the German contribution to international legal doctrine in the nineteenth and twentieth centuries. In 1999, thanks to the endeavours of R. St. J. Macdonald (Dalhousie Law School), the first issue of *The Journal of the History of International Law* was published.

International coordination of research in the history of international law is of the utmost importance. Not only is it expedient to join forces for practical reasons and to allow scholars to enter into discussions with their colleagues, but it is also necessary to protect this young and not fully grown field from the 'slings and arrows of outrageous fortune'. After all, the resurgence of interest in the history of international law is not unique. Even today, it is still not safe to submit that present interest is more fundamental than it is fashionable. We are living in an era of great change in current international law. As before, it is just that which causes historical reflection on international law to be more popular. The periods of World War I and, somewhat less, World War II were also marked by a brief and limited increase in popularity of historical discourse among international lawyers and, though to a lesser extent, legal historians.

This book is the result of an attempt to bring together those European scholars from different backgrounds who over the last decades have worked on historical peace treaties. Among the contributors to this volume are legal historians, Roman lawyers, international lawyers, diplomatic historians and an International Relations theorist. Though all present were acquainted with one another's work, for many of them the meeting at Tilburg University on 30 and 31 March 2001 where they presented and discussed their ideas was the first occasion to meet colleagues in the flesh. It was physical proof of the necessity to combine efforts and coordinate work.

Peace Treaties and International Law in European History delves into the history of peace treaties as legal instruments in early modern Europe (late fifteenth century to 1920). However, the book by no means exhausts the subject. It draws from the most recent research, by both the contributors and others, but at the same time indicates the many lacunae that still exist there. In many respects, the book seeks to open debate and not to end it.

The scope of the book is twofold. Both the law which governs peace treaties – peace treaty law – and the law as it emerged from peace treaties are under scrutiny. The book goes beyond the analysis of treaties as legal instruments to the analysis of peace treaties as sources of the law of nations. Even the term 'source' is to be understood in both senses: treaties as historical sources for the existing rules of substantive international law and

treaties as *traités lois* constitutive for new rules of material international law. In short, it is felt by the authors that the study of peace treaties is an appropriate way to start systematic and coordinated research into the history of international legal practice. As one of the main instruments used among the primary subjects and authors of the law of nations, peace treaties are a microcosm of that law. Moreover, while the book is an attempt to break through the traditional concentration on doctrine and turn to legal practice as well, the historical discourse of scholars is not overlooked.

There are two important limitations to the scope of the book. First, there is a geographical one. This is a history of European peace treaty practice. For the most part, treaties between and with non-European powers are excluded, and the whole problem of European expansion and colonialism is largely overlooked. Certainly this last limitation is an important one. Nowadays, more and more scholars accept that the confrontation of Europe from the 1500s onwards with the world beyond Europe was of the utmost importance for the formation of modern international law. Though the authors of this book do not deny this, it is felt that its impact only came to change the fundamental structure of international law from the nineteenth century onwards. Heinhard Steiger, who covers this period in this volume, therefore includes this issue in his chapter.[4]

Second, there is a limitation as regards the period covered. The book concentrates on the early modern era and the nineteenth century. While the Peace Treaties of Westphalia of 1648 have for a long time been held to be the very birth certificates of the modern European states system and its law of nations, the book goes farther back beyond this epochal date. While it cannot be denied that Westphalia is a benchmark in the history of the law of nations, the Peace Treaties of Westphalia as well as later treaties drew on a tradition of peace treaties and law that was older. Since the beginning of the twentieth century, it has become quite common to push back the beginnings of the modern law of nations to the sixteenth century and to the writings of the Spanish neo-scholastics, Francisco de Vitoria (*c.* 1480–1546) being first and foremost among them. While the early sixteenth century is indicated because of developments in doctrine, there are also events in general and political history such as the rise of the great dynastic states and the Reformation, which had an important impact on peace treaty practice. These considerations force us to take the

[4] See also Heinhard Steiger, 'From the International Law of Christianity to the International Law of the World Citizen', *Journal of the History of International Law* 3 (2001), 180–93.

whole sixteenth century and even the late fifteenth century into account. It is surely rewarding to include the practices of the Italian states of the late fifteenth century, as Italy is often considered to be a laboratory for later European diplomatic practices.[5]

The choice of the Peace Treaties of Paris (1919/20), which ended the Great War, as *terminus ad quem* is a more obvious one. These treaties, and particularly the Peace Treaty of Versailles between the Allied victors of the Great War and Germany, marked a fundamental turning point in the history of international law. Not only was it the first punitive peace between sovereigns since at least the late Middle Ages, thus dealing a serious blow to state sovereignty, but it also was the starting point for the era of international organisations.[6] Moreover, during the twentieth century, peace treaties gradually lost their monopoly in the field of peace settlement. After World War II, many wars did not end with the conclusion of a peace treaty. One of the most important recent wars, the Second Gulf War (1991) was ended by means of a UN Security Council Resolution. Many wars only led to armistices, while others just died out and peace was restored without an explicit juridical settlement.

The book is subdivided into four parts. In Part I, chapters 2 to 4 offer a chronological survey of the legal history of peace treaties and their contributions to international law from the Peace of Lodi (1454) to the Treaties of Paris (1919/20). The authors Randall Lesaffer, Heinz Duchhardt and Heinhard Steiger summarise the findings of recent research. As there is much more accessible secondary literature on the era between 1648 and 1815, and as many features of peace treaty practice of that era are common knowledge, Duchhardt can concentrate on some less well-known aspects.

Part II, 'Thinking peace: voices from a distant past', takes us back in time, beyond the early modern era. One of the central assumptions underlying this book is that early modern peace treaty law drew on a long tradition of thought and practice, which was rooted in the late Middle Ages, which in its turn, like all medieval scholarship, referred back to Antiquity. Christian Baldus, a specialist in Roman treaty practice, discusses the legal dimension of Roman peace treaty practice. Karl-Heinz Ziegler, another specialist

[5] See also Randall Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law', *British Year Book of International Law* 73 (2002), 103–139.

[6] Wilhelm G. Grewe, 'Was ist klassisches, was ist modernes Völkerrecht?' in Alexander Böhm, Klaus Lüdersen and Karl-Heinz Ziegler (eds.), *Idee und Realität des Rechts in der Entwicklung internationaler Beziehungen: Festgabe für Wolfgang Preiser* (Baden Baden, 1983), pp. 111–31.

in Roman treaty law, assesses the impact of Roman law on medieval doctrine and practice. Hanna Vollrath and Alain Wijffels address two important issues of canon law influence on the medieval 'law of peace'. Vollrath's exposition of the role of ritual, and more particularly the kiss, in the process of peacemaking illustrates the emergence of canon law as the primary source of the medieval *ius gentium*. Alain Wijffels's chapter is the very first in-depth analysis of the most comprehensive autonomous treatise on peace treaty law from the learned tradition of medieval *ius commune*, a work by the fifteenth-century Italian canon lawyer Martinus Garatus Laudensis. An edition of this treatise by Wijffels forms an appendix to this volume. With these four chapters, the authors aspire to offer insights into the ideas and practices of the Middle Ages that, partly through the prestige the learned *ius commune* continued to enjoy, are felt to have thoroughly influenced the modern law of nations in its formative period, until deep into the seventeenth century. To assess the exact impact of medieval and classical ideas on modern peace treaties and the modern law of nations would take many decades of systematic research. However, Dominique Bauer and Laurens Winkel – the former as regards canon law, the latter as regards Roman law – try to disperse some of the clouds by highlighting some examples.

While the doctrine of the seventeenth century was overshadowed by its dialectical debate with medieval scholarship, rationalism and the Enlightenment caused the eighteenth- and nineteenth-century scholars to look ahead. The third part, 'Thinking peace: towards a better future', highlights three aspects of eighteenth- and nineteenth-century thinking about peace. Marc Bélissa illustrates the contribution of the French eighteenth-century *philosophe* Mably. Ingo Hueck and Mathias Schmoeckel turn to the decades before and after 1900 when from different angles the existing sovereign state system was challenged and the idea of securing peace through international organisations won ground. Hueck offers a synthesis of recent research on German scholarship and its role in the Hague Peace Conferences of 1899 and 1907, while Schmoeckel in discussing the ideas of Lassa Oppenheim gives a better insight into the impact of the Paris Peace Treaties of 1919/20 on international law. Andreas Osiander's chapter holds a somewhat peculiar place, as he does not address historical thought, but approaches the subject from the perspective of social science, and more specifically International Relations theory. In fact, he claims that the political discourse surrounding peace negotiations often sheds more light on the structural and legal context within which a treaty has to be considered than contemporary doctrine.

The last part, 'Making peace: aspects of treaty practice', concentrates on four fundamental aspects of early modern European treaty practice on which somewhat more research has already been done. Ronald Asch and Christian Tomuschat turn to two of the most epochal peace settlements of the era discussed, Westphalia and Versailles. Over the last few years, in the context of the 350th anniversary of the Westphalia Peace Treaties, a vast amount of literature on these Treaties saw the light of day, and Asch has selected an aspect which has received surprisingly little attention, the right of the imperial estates to make alliances with other estates and with foreign powers. In addressing this issue, Asch clarifies some of the difficulties of interpretation historians have met in dealing with the Peace Treaties of Wespthalia because of their hybrid nature as both international peace treaties and constitutional instruments. Tomuschat sheds light on the importance of Versailles through a comparison with the peace settlement that ended the Franco-German war of 1870/71. Karl-Heinz Ziegler contributed a second chapter, this time on the peace treaties between Christian powers and the Turkish Empire. Even in a book on peace treaties between European – read Christian – powers, the continuous relations with the major non-Christian European power of the early modern era could not be neglected. Finally, Stephen Neff goes into the problem of restoring commercial relations between former enemies which, during the era discussed, was often done in separate treaties.

PART I

Peace treaties and international law from Lodi to Versailles (1454–1920)

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Peace treaties from Lodi to Westphalia

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The myth of Westphalia

Historians and international lawyers alike have for a long time been quite unanimous in calling the Peace Treaties of Westphalia of 1648 the very birth certificates of the modern European states system and the modern law of nations. In the context of the 350th anniversary of these treaties, scholars from various countries and disciplines have gone a long way to challenging this Westphalian myth.[1]

Traditionally, it was alleged that the Westphalian Treaties laid down the basic principles of the modern law of nations, such as sovereignty, equality, religious neutrality and the balance of power. However, this cannot be sustained after a careful analysis of the treaties themselves and a comparison with older peace treaties. These principles are to be found in none of the three main Westphalian Peace Treaties, at least not as principles of international law.[2] In fact, references about the sovereignty and equality of religions can only be found in the treaties when they concern the constitutional arrangement for the Holy Roman Empire. Moreover,

[1] Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty', *International History Review* 21 (1999), 569–91; Randall Lesaffer, 'The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Settlements prior to 1648', *Grotiana* NS 18 (1997), 71–95; Meinhard Schröder, 'Der westfälische Friede – eine Epochengrenze in der Völkerrechtsentwicklung?' in Meinhard Schröder (ed.), *350 Jahre westfälischer Friede: Verfassungsgeschichte, Staatskirchenrecht, Völkerrechtsgeschichte* (Schriften zur europäischen Rechts- und Verfassungsgeschichte 30, Berlin, 1999), pp. 119–37; Heinhard Steiger, 'Der westfälischen Frieden – Grundgesetz für Europa?' in Heinz Duchhardt (ed.), *Der westfälische Friede: Diplomatie, politische Zäsur, kulturelles Umfeld, Rezeptionsgeschichte* (Munich, 1998), pp. 33–80; Karl-Heinz Ziegler, 'Die Bedeutung des westfälischen Friedens von 1648 für das europäische Völkerrecht', *Archiv des Völkerrechts* 37 (1999), 129–51; Ziegler, 'Der westfälischen Frieden von 1648 in der Geschichte des Völkerrechts' in Schröder, *350 Jahre westfälischer Friede*, pp. 99–117.

[2] Treaty of Münster of 30 January 1648 between Spain and the United Provinces; Treaty of Münster of 24 October 1648 between the Empire and France; Treaty of Osnabrück of 24 October 1648 between the Empire and Sweden.

these reminiscences are not new or innovative. It was only some decades after 1648 that diplomats and jurists started to see these clauses as reflecting upon international relations. This transposition of what are in fact internal constitutional arrangements to the domain of the international, or better European, legal order can be explained by the hybrid character of the Treaty of Osnabrück of 24 October 1648, between the Empire and Sweden, and of the Treaty of Münster of the same date, between the Empire and France. Those two treaties are both international peace treaties between the Empire, its estates and a foreign power and an internal, constitutional-religious settlement for the Holy Roman Empire. The clauses that lay down international peace are far from original and do not allow an assessment of the Westphalia Peace Treaties as constituting a caesura in the technical-juridical development of peace treaty practice and law.

Nevertheless, the period of the Westphalia Peace and the decade that followed does constitute an important caesura in the development of the European legal order as a whole. The Westphalia Peace Treaties put an end to the last long and bitter religious war in Europe. They also succeeded in more or less pacifying the Holy Roman Empire and thereby giving more stability to Central Europe. Moreover, the 1640s and 1650s saw the last important rebellions and civil wars within the most important European powers such as France, Spain and England. These decades also marked the end of a century of religious strife among and religious and civil turmoil within the most powerful European countries, which had wrecked the old European legal order. In short, the Westphalia Peace Treaties did not lay down the basic principles of the modern law of nations; they did, however, lay down the political and religious conditions for allowing the European powers to start building a new international legal order.[3]

The crisis of the European legal order

Since the beginning of the twentieth century, international legal historians have come to modify the traditional view that the modern doctrine of the law of nations stems from the seventeenth century. While the impact of the Dutch humanist Hugo Grotius (1583–1645) on modern doctrine is still considered to be enormous, most historians now accept that Grotius and his successors largely drew from the writings of their sixteenth-century

[3] See the references in n. 1 as well as Randall Lesaffer, 'La dimensión internacional de los Tratados de Paz de Westfalia. Un enfoque juridico' in *350 años de la Paz de Westfalia: del antagonismo a la integración en Europa* (Madrid, 1999), pp. 32–53.

predecessors. At present, it is common to stress the continuity between the different writers on international problems of the sixteenth century and the modern international lawyers of the seventeenth and eighteenth centuries.[4]

More in general, the period from around 1450 until the Westphalia Peace Treaties has been crucial for the development of the modern European states system and its international law. These two centuries, and more specifically the first half of the sixteenth century, saw the final breakdown of the medieval European legal order, and marked an important step in the emergence of what was to become the modern sovereign state.

Medieval and Renaissance Europe defined itself as a religious, cultural and, to a certain extent, political and juridical unity, often referred to as the *respublica christiana*.[5] Although there were many more or less autonomous political entities in the Latin world, ranging from large dynastic monarchies to small fiefs and free cities, they were all considered to take part in a greater hierarchical and juridical *continuum* under the supreme, if theoretical, leadership of the pope and the emperor.[6] The learned *ius commune* – Roman and canon law – as well as the general rules and principles of feudal law provided a framework of juridical concepts and political ideals that was common to the whole of the Latin West, in which the legal organisation of international relations could be vested.[7]

[4] James Brown Scott was among the first and foremost to re-evaluate the Spanish neo-scholastics such as Francisco de Vitoria (*c.* 1480–1546) and Francisco Suarez (1548–1617); James Brown Scott, *The Spanish Origin of International Law: Lectures on Francisco de Vitoria (1480–1546) and Francisco Suarez (1548–1617)* (Washington, 1928); Scott, *The Spanish Conception of International Law and Sanctions* (Washington, 1934); Scott, *The Catholic Conception of International Law: Francisco de Vitoria, Founder of the Modern Law of Nations. Francisco Suarez, Founder of the Modern Philosophy of Law in General* (Washington, 1934); Scott, *The Spanish Origin of International Law: Francisco de Vitoria and His Law of Nations* (Oxford, 1934). Vitoria even jeopardised Grotius' acclaimed fatherhood of the modern law of nations, see Wilhelm G. Grewe, 'Hugo Grotius – Vater des Völkerrechts?', *Der Staat* 23 (1984), 161–78. Defended, however, by Karl-Heinz Ziegler, 'Hugo Grotius als "Vater des Völkerrechts"' in Peter Selmer and Ingo von Munch (eds.), *Gedächtnisschrift für Wolfgang Martens* (Berlin, 1987), pp. 851–8, and 'Die Bedeuting von Hugo Grotius für das Völkerrecht – Versuch einer Bilanz', *Zeitschrift für Historische Forschung* 13 (1996), 354–71.

[5] The term *respublica christiana* was already in use in the late Middle Ages, but became more common from the Renaissance (1450–1530) onwards. Even after the collapse of the medieval system the term survived for another two centuries.

[6] Wilhelm G. Grewe, *The Epochs of International Law* (trans. Michael Byers, Berlin, 2000), pp. 37–74; Karl-Heinz Ziegler, *Völkerrechtsgeschichte* (Munich, 1994), pp. 97, 107–11, 120–7 and 133–7.

[7] On the importance of canon law in international relations: James Muldoon, 'The Contribution of the Medieval Canon Lawyers to the Formation of International Law', *Traditio* 28 (1972), 483–97; Muldoon, 'Medieval Canon Law and the Formation of International Law',