THE CAMBRIDGE HISTORY OF

INTERNATIONAL LAW

*

VOLUME VI:

International Law in Early Modern Europe

Volume VI of *The Cambridge History of International Law* offers a survey of the law of nations in early modern Europe through a balanced treatment of legal theory and diplomatic practice. Bringing together a wide range of scholars, this volume builds on recent historiographical insights from different disciplines, including legal history, diplomatic history and the history of political thought. It considers all major themes ranging from the allocation of jurisdiction over land and sea, war- and peacemaking, trade and navigation to diplomacy and dispute settlement. A unique overall synthesis of early modern law across nations in Europe.

Randall Lesaffer is Professor of Legal History at KU Leuven in Belgium and Tilburg University in the Netherlands. He is the author of *European Legal History: A Cultural and Political Perspective* and co-editor of *The Cambridge Companion to Hugo Grotius*. He is the editor-in-chief of the book series Studies in the History of International Law, an editor of the Global Law series and an editor of the *Journal of the History of International Law*.

THE CAMBRIDGE HISTORY OF

INTERNATIONAL LAW

Editor-in-chief

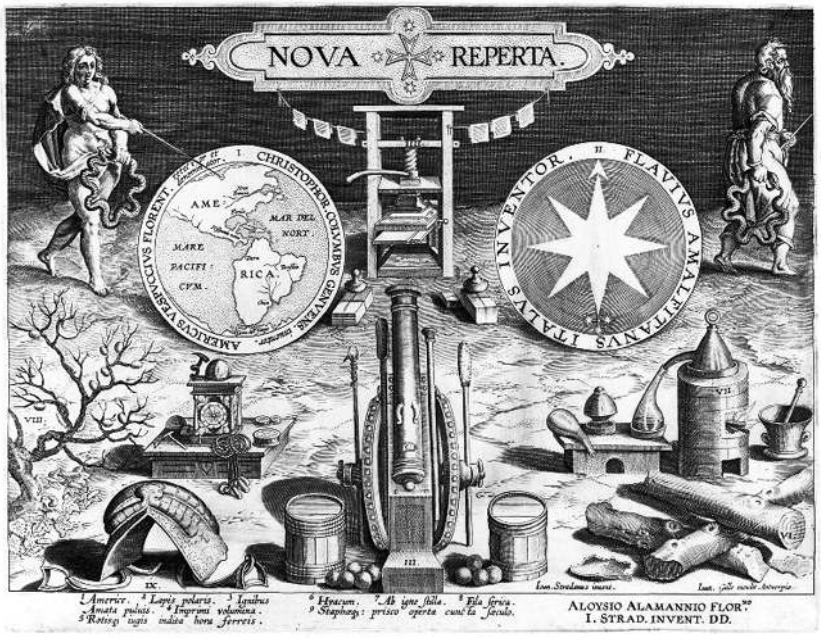
Randall Lesaffer, *KU Leuven and Tilburg University*

Volume editors

Saliha Belmessous
Jenny Benham
Eyal Benvenisti
Maria Adele Carrai
Matthew Craven
Jesper Eidem
Jakob Giltaij
Ryan Greenwood
Mark Hickford
Robert Kolb
Adam Kosto
Dino Kritsiotis
Randall Lesaffer
Momchil Milanov
Stephen C. Neff
Umut Özsu
Sundhya Pahuja
Anne Peters
Gerry Simpson
Paulina Starski
Intisar Rabb
Surabhi Ranganathan
Kaius Tuori
Inge Van Hulle
Miloš Vec

The Cambridge History of International Law

Cambridge University Press & Assessment
978-1-108-48561-6 — The Cambridge History of International Law
General editor Randall Lesaffer
Frontmatter
More Information



Frontispiece of *Nova reparta* (*c.* 1600) by Johannes Stradanus.

THE CAMBRIDGE
HISTORY OF
INTERNATIONAL LAW

*

VOLUME VI

International Law in Early Modern Europe

RANDALL LESAFFER
KU Leuven and Tilburg University

CAMBRIDGE
UNIVERSITY PRESS

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment, a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108485616

DOI: 10.1017/9781108757355

When citing this work, please include a reference to the DOI 10.1017/9781108757355

First published 2025

Printed in the United Kingdom by CPI Group Ltd, Croydon CR0 4YY

A catalogue record for this publication is available from the British Library.

A Cataloging-in-Publication data record for this book is available from the Library of Congress

ISBN 978-1-108-48561-6 Hardback

Contents

The plates will be found between pages 360 and 361.

Plates

Frontispiece

Frontispiece of *Nova reparta* (*c.* 1600) by Johannes Stradanus. The Miriam and Ira D. Wallach Division of Art, Prints and Photographs: Print Collection, The New York Public Library (1638). Speculum diuersarum imaginum speculatiuarum Retrieved from https://digitalcollections.nypl.org/items/2c3a3b00-9700-0139-f430-0242ac110003#/?uuid=2c3a3b00-9700-0139-f430-0242ac110003.

Contributors

Kinji Akashi is a professor of international law at Kyushu University, Japan. He obtained his doctoral degree from the University of Utrecht. His principal publications cover the history and fundamental theories of the law of nations in Europe and East Asia.

Guido Braun is Professor of Early Modern History at the University of Upper Alsace (Mulhouse) and Director of the Research Centre CRÉSAT. He is a former member of the German Historical Institutes in Rome and Paris. His research focuses on the history of international relations in the early modern era.

Stefano Cattelan is a postdoctoral researcher at the Vrije Universiteit Brussel (VUB) and adjunct professor at the Brussels School of Governance (BSoG). He holds a PhD in law from Aarhus University and a master's degree in law from the University of Trento. His research focuses on the history of international law and the law of the sea between the sixteenth and eighteenth centuries.

Dave De ruysscher is a legal historian and lawyer. He researches in themes regarding the history of commercial and private law until the present day. He is Full Professor at Tilburg University, Associate Professor at Vrije Universiteit Brussel, member of the Young Academy of Flanders (Belgium) and a multiple ERC Grantee.

Frederik Dhondt is Associate Professor of Legal and Political History at the Faculty of Law and Criminology of the Vrije Universiteit Brussel, and voluntary postdoctoral researcher at the Ghent Legal History Institute and the Gustave Rolin Jaequemyns Institute of International Law, and president

of the Royal Commission for the Publication of Old Laws and Ordinances of Belgium.

Dante Fedele is research fellow at the French CNRS, affiliated with the Centre d'Histoire Judiciaire (Lille). His field of research is legal history, with a particular focus on late medieval and early modern diplomacy, international law and *jus commune*.

Linda Frey, Professor Emeritus, the University of Montana and Marsha Frey, Professor Emeritus, Kansas State University, in tandem co-authored 15 books and over 100 articles on diplomacy and international law, including *The History of Diplomatic Immunity* and, most recently, *The Culture of French Revolutionary Diplomacy: In the Face of Europe*.

Tamar Herzog is Monroe Gutman Professor at Harvard and is an affiliated faculty member at the Harvard Law School. She authored seven books (most recently *A Short History of European Law*), four edited volumes (most recently, *The Cambridge History of Latin American Law*), and over 150 articles and book chapters.

Christoph Kampmann is Professor of Early Modern History at the University of Marburg. Between 2011 and 2013, he was president of the German Early Modern Historians Association. He has been founding chairman of the corroborative centre (Sonderforschungsbereich) on 'Dynamics of Security' in Marburg/Giessen since 2014 and is a member of the European Academy of Arts and Sciences and of the Historical Commission at the Bavarian Academy of Arts and Sciences.

Raymond Kubben studied law and public administration. He obtained his PhD in 2009 and lectured at Tilburg University for some years, specialising in international legal history, constitutional history and the history of public administration. Since 2014 he has served as senior adviser at the Dutch Ministry of Education, Culture and Science.

Randall Lesaffer is Professor of Legal History at KU Leuven and Tilburg University. He is author of *European Legal History: A Cultural and Political Perspective* and co-editor of *The Cambridge Companion to Hugo Grotius*. He is editor-in-chief of the book series Studies in the History of International Law, an editor of the Global Law series and an editor of the *Journal of the History of International Law*.

Louis Sicking is the Aemilius Papinianus Professor of History of Public International Law at Vrije Universiteit Amsterdam and lectures premodern history at Leiden University. His books include *Neptune and the Netherlands*, *Colonial Borderlands* and *La naissance d'une thalassocratie*. He is a winner of the Prix Descartes-Huygens of the French Académie des Sciences.

Anuschka Tischer is a full professor of early modern history at the University of Würzburg. She studied history and philosophy, holds an MA (1992) and a PhD (1998) from the University of Bonn and a Habilitation (2009) from the University of Marburg. She has published on the Peace of Westphalia, on French history and on early modern war justifications.

Valentina Vadi is an adjunct professor in international law at the School of Political Sciences of the University of Florence and a Jean Monnet fellow at the Robert Schuman Center for Advanced Studies at the European University Institute. She is the author of *War and Peace: Alberico Gentili and the Early Modern Law of Nations*.

Maurits H. van den Boogert holds a PhD in Oriental Studies from the University of Leiden. He has extensively published on European–Ottoman relations. He is author of *Friends and Rivals in the East: Studies in Anglo-Dutch Relations in the Levant from the Seventeenth to the Early Nineteenth Century* and of *Aleppo Observed: Ottoman Syria through the Eyes of Two Scottish Doctors, Alexander and Patrick Russell*.

Alain Wijffels is Emeritus Professor of the universities of Leiden, Leuven and Louvain la Neuve. He is also a retired senior research fellow of the French CNRS. His current research focuses on the unpublished papers of Alberico Gentili and on the Anglo-Hanseatic relations.

Preface

International Law in Early Modern Europe covers the development of inter- and transnational law in Christian Europe between about 1492 and 1775. Since its first inception in the nineteenth century, the modern historiography of international law has given pride of place to the subject. Early modern Europe was considered the time and place of the emergence of the modern, 'Westphalian' state system and the formation of the law of nations as a body of law regulating relations among sovereign states. Europe's law of nations of the sixteenth to eighteenth centuries was singled out for scholarly study as the direct antecedent to modern international law.

The state- and Eurocentric nature of the historiography of international law of the nineteenth and most of the twentieth century has benefited the study of the early modern, European law of nations and has cast the law of other regions and periods into the shadows. Yet, it has also constricted the thematic and methodological approach to the subject in different manners. Each of these constrictions has fallen under critical scrutiny during the past quarter-century.

Firstly, interest in the period, particularly among international lawyers, was largely determined by its indication as the formative period of modern international law. In general, scholars made ample use of the scholarly writings from the jurisprudents of the law of nature and of nations, to the exclusion of many other relevant streams of scholarly literature and to the stark neglect of legal practices. In consequence, the writings of a small array of canonical authors – Hugo Grotius, his so-called precursors and successors – whose key works James Brown Scott had collected in The Classics of International Law, have been readily used as a convenient shorthand for the international law of the period. If anything, recent scholarship, like Martti Koskenniemi's recent book[I] has shown, *primo*, that the jurisprudence of the

[I] Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1780* (Cambridge: Cambridge University Press 2021).

law of nature and of nations was far richer and more diverse that the narrow genealogy of authors that is normally considered, and, *secundo*, that this jurisprudence did not exhaust scholarly discussion of the normative organisation of inter- and transnational relations.

Secondly, early modern scholarship has been largely treated as if it were a completely novel and original creation. While it is true that the law of nations emancipated itself from general legal scholarship during the sixteenth and seventeenth centuries, emerging as a separate subject of discussion and, with time, as an autonomous field of scholarship, this did not prevent it from deriving many of its principles, conceptions, institutions and procedures form medieval theology and canon as well as civilian jurisprudence, the *jus commune*. After Peter Haggenmacher's classic on the medieval antecedents to Grotius' work on the laws of war and peacemaking appeared in 1983,[2] studies on the late medieval jurisprudence with regards to international relations remained few and far in between, although in most recent years this has begun to change.[3]

Thirdly, state-centrism has logically engendered a focus on those events, debates and evolutions, which highlight the rise of the sovereign state and the articulation of the law of nations as a system that was premised on it. In recent years, increasing attention had been devoted to counter-currents, to the communitarian dimension of the law of nations, to the role of non-state agents and to transnational relations among private persons, in particular in the economic sphere.

Fourthly and finally, whereas the modern historiography of international law, since its beginnings, devoted time and energy to the role of the law of nations in the context of empire-building and colonisation outside Europe, the subject has largely been kept separate from intra-European developments. It is only in the last decade that scholars have started to bridge this divide.[4]

Within the overall structure of *The Cambridge History of International Law* series, this volume forms one of three (Volumes V to VII) that cover Christian Europe and the West as spaces where regional systems of

[2] Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris: Presses universitaires de France 1983).
[3] E.g. Dante Fedele, *The Medieval Foundations of International Law. Baldus de Ubaldis (1327–1400), Doctrine and Practice of the Ius Gentium* (Leiden and Boston: Brill/Nijhoff 2021).
[4] E.g. Tamar Herzog, *Frontiers of Possession. Spain and Portugal in Europe and the Americas* (Cambridge, MA and London: Harvard University Press 2015).

international law emerged. Within the series' design, early modern Christian Europe is thus 'provincialized'.[5] Early modern thinkers and actors, who engaged with inter- and transnational relations and their legal organisation, considered 'Europe', a term which was used with increasing frequency from the end of the seventeenth century onwards, as a separate and largely autonomous political and legal space whose nature was first and foremost Christian. Although Christian religion, in its diverse confessional moulds, armed European explorers, merchants, colonisers and conquerors with an arsenal of self-justifying, authoritative arguments to impose their power and views outside Europe, they did not yet adhere to a universalist agenda for a global legal order and could flexibly adapt to the customs and laws of other regions to the tunes of opportunity and power balances.[6]

The chapters in this volume align themselves with recent scholarship, which has begun to address and transcend the restrictions the historiography of international law has long imposed on its subject. Firstly, the authors attempt to make a balanced use of diplomatic and state practice as well as historical scholarship. There remains a measure of variety among the chapters, however, in this respect, in view of the state of research on practice. Secondly, inasmuch as the chapters reflect on the meaning of early modern law for the *longue durée* between the Middle Ages and the nineteenth century, they do so by looking backwards as well as forwards. This implies, among other matters, that the chapters from Part I on Renaissance Europe discuss the use and recycling of late medieval theology and law by sixteenth- and seventeenth-century lawyers and diplomats, where most relevant. Thirdly, the authors strive for a balanced discussion of the built-in tension between sovereignty and community and between centralisation and elite resistance. They do not one-sidedly focus on the role of central governments, but also include local, regional and national elites, local and regional secular and ecclesiastical institutions, merchants and companies. Moreover, whereas modern historiography has long overstated and antedated the secularisation of international relations and law in Europe, in this volume due attention will be given to the impact of religion and confessional controversy on the discourse and practice of the law of nations. The volume thus breaks with the 'Westphalian myth' which has erroneously labelled 'The Peace of

[5] Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press 2000).
[6] See e.g. Jennifer Pitts, *Boundaries of the International. Law and Empire* (Cambridge, MA and London: Harvard University Press 2018).

Westphalia' the birth act of the European states system and mistakenly hailed it for achieving the secularisation of international relations and law. Fourthly, some of the chapters transcend the boundaries of Christian Europe and cover, where this is most relevant to the subject, both the intra-European and outer-European (imperial) dimensions of the law of nations.

The term 'international law' is used generically throughout The Cambridge History of International Law series to indicate the great variety of inter- and trans-polity law and normative systems from human history. Nevertheless, within the chapters of this volume it is most often substituted by the phrase 'law of nations' to refer to the amalgam of legal norms that governed relations between polities and their subjects. The choice is justifiable by the use of the Latin original *jus gentium* or its rendering in various vernacular languages, in both the scholarship and the diplomatic practice of the early modern age. The phrase was an heirloom from ancient Roman law, which through Antiquity and the Middle Ages had gathered different meanings under its broad cloak. To late medieval and early Renaissance scholars, it most generally signified the laws that were common to all (Christian) peoples and applied both to private persons and to rulers and governments in their various relations. However, between the middle of the sixteenth and the midst of the seventeenth century, jurists and theologians began to weaponize the term in the service of central rulers' agendas to gain exclusive jurisdiction over external relations. They advanced a reductive meaning of *jus gentium* as a body of law that exclusively applied to relations among sovereign princes and polities. This was, and remained for a long time, a paradigmatic claim and argumentative position rather than a reality. For that period of time, the body of customs and treaties that was referred to as the law of nations exhausted the regulation of inter- and trans-polity relations in Christian Europe as little as the classical genealogy of jurisprudents of the laws of war from the Renaissance period and of the law of nature and of nations from the Old Regime period exhausted scholarly speculation about these relations. The reconceptualisation of the 'law of nations' as law among sovereigns was a contentious move in the century-long struggles that marked the process of state formation in early modern Europe. The literature that advanced this agenda was likewise just one stream of thought in a wider scholarly and multi-disciplinary discussion about the allocation of domestic and international governance power. By forwarding the term 'law of nations', this volume indicates the rise of the sovereign state as a key theme. The dynamics that arise therefrom are, however, not conceived of in terms of an inexorable, one-sided progress but as an arena for power struggles,

power accumulation and resistance, and in terms of a rich intellectual debate where the jurisprudents of the law of (nature and of) nations had to contend with diverse and often competing disciplines such as theology, ethics, political philosophy, natural philosophy, statecraft and political economy.

The volume falls into two chronological parts, covering the Renaissance (1492–1660) and Old Regime (1660–1775). The first decades of the Renaissance were marked by a severe and profound disruption of the pre-existing political and legal order of the Latin West. The Reformation destroyed the major pillar on which it had rested – the common faith and the 'universal' (that is for the whole Latin West) authority of the pope and canon law – and triggered a series of international and internal wars that destabilised the order of Europe until the midst of the seventeenth century. This coincided with the rise of a few powerful composite monarchies against the backdrop of military technological changes and the overall growth of the size of armed forces and the impact of warfare. Finally, the discovery of the 'New World' made the old framework of the *jus commune* of Roman and canon law obsolete for the regulation of international relations outside the 'Old World'.

The crisis of the Latin West that followed from these disruptions endured until the middle of the seventeenth century. It fostered intellectual and scholarly engagement with international relations and their legal regulation and forced scholars to adapt the intellectual heirlooms from late medieval laws and theology to the newly emerging realities of a confessionally divided Christian Europe, an expanding geography of the world and the emergence of strong monarchies and a few republics as the ultimate power brokers of war, diplomacy and, increasingly, trade. The Renaissance period ended with two decades of civil wars in many of the major countries of Europe in the 1640s and 1650s.

Around 1660, the internal pacification of the major areas of Christian Europe created the conditions of stability for a new political and legal order to emerge. The outcome of rebellions, religious and civil wars had, in most cases, left central governments in place with a measure of control over international relations and domestic governance that warrants us to speak of sovereign states, allowing for the particular cases of the Holy Roman Empire and Northern Italy. In the decades to follow, a law of nations, here referred to as 'the classical law of nations', was fleshed out that was indeed largely conceived as the preserve of sovereigns. Over the Old Regime period (1660–1775), it expanded its purview over increasing parts and dimensions of inter- and transnational relations and regulatory fields such as neutrality, maritime warfare, the law of the sea, pacific dispute settlement and interstate

trade. The infernal workings of the state as a war machine, the integration of diplomacy through coalition warfare, multilateral conferences and treaty networking and the growing interference of central governments with parts of the economy – in particular international and colonial trade as well as financial markets – gave the paradigm of the classical law of nations increasing reality. Nevertheless, transnational relations between non-sovereign agents such as cities, other local governments, corporations, estates, ecclesiastical institutions and individual power brokers persisted all through the period, although they were largely ostracised from the purview of that law of nations or formally channelled through the mediation of sovereign rulers and their institutions. Moreover, the monopolisation of jurisdiction over international relations by sovereigns often remained a formal affair, as the exclusion of elites at times occurred through their inclusion in the machinery of state, as its direct agents, or its contractors.

The *terminus ad quem* for the book is the year 1775, when the constitutional conflict between the British government and the American colonies erupted into civil war, which ultimately led to the establishment of the first, Christian sovereign state of European provenance and design outside Europe. It expanded the European law of nations to a Northern Atlantic one. Moreover, the 1770s marked the erosion of the Old Regime's legal order as a system for the bilateral as well as collective management of disputes between, first and foremost, the great powers of Europe.[7] The years around 1775 thus mark the beginnings of an expansion of the 'province' of the 'classical law of nations' to the so-called Western world, and of the transition the Old Regime to the revolutionary era, covered in the seventh volume of *The Cambridge History of International Law*.

This volume is the collective work of its authors, but has also much benefited from the commitment of the Cambridge University Press staff who were and are involved with *The Cambridge History of International Law* series. Particular words of thanks go to Finola O'Sullivan, Elizabeth Hanlon, Marianne Nield and Victoria Phillips, who helped to steer this project from its early beginnings in 2016 to fruition in 2024.

On 1 December 2022, Linda Frey passed away. Linda co-authored the chapter on Old Regime diplomacy with her twin Marsha. Linda was an impressive historian of international relations and law who, over the years, has produced, together with Marsha, a remarkable array of innovating and

[7] Paul W. Schroeder, *The Transformation of European Politics 1763–1848* (Oxford: Clarendon Press 1994).

profound works. Their book on diplomatic immunity was an instant classic.[8] While I never had the pleasure of meeting her, I learned a lot from her through her works and know from colleagues who knew her well that she was a person who combined thorough and rigorous scholarship with kindness and devotion. On behalf of all authors in this book, I express the deepest sympathy to her family, and especially to Marsha.

[8] Linda S. Frey and Marsha L. Frey, *The History of Diplomatic Immunity* (Columbus: Ohio State University Press 1999).

Abbreviations

AMAE	Archives du Ministère des Affaires Etrangères, Paris
BNF	The Bibliothèque nationale de France
CTS	Clive Parry (ed.), *The Consolidated Treaties Series*, 231 vols. (Dobbs Ferry, NY: Oceana Press 1969–81), also as *Oxford Historical Treaties*, https://opil.ouplaw.com/home/OHT.
CUD	Jean Dumont, *Corps universel diplomatique du droit des gens*, 8 vols. (Amsterdam and The Hague: Brunel, Weststein, Janson de Waesberge, L'Honoré & Chatelain/Husson and Charles Levier 1726–31).
IPM	Instrumentum Pacis Monasteriensis (Peace Treaty of Münster, 24 October 1648). Critical edition in Antje Oschmann (ed.), *Die Friedensverträge mit Frankreich und Schweden*, vol. I, *Urkunden* (Acta Pacis Westphalicae, series III B, vol. 1/1) (Münster: Aschendorff 1998) 1–94.
IPO	Instrumentum Pacis Osnabrugensis (Peace Treaty of Osnabrück, 24 October 1648). Critical edition in Antje Oschmann (ed.), *Die Friedensverträge mit Frankreich und Schweden*, vol. I, *Urkunden* (Acta Pacis Westphalicae, series III B, vol. 1/1) (Münster: Aschendorff 1998) 95–191.
TNA	The National Archives, London