Introduction

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The interwar years are the shortest period covered in these volumes, and perhaps the most intense and eventful one. So many things happened in the short course of this quarter of a century that it would deserve an entire Cambridge History series of its own. Unlike other volumes, whose temporal boundaries are harder to establish, this one does not pose a problem. It is firmly locked between the iron parentheses of two devastating catastrophes, if such a pleonasm may be allowed.

The era of the League of Nations marks a profound rupture in the body of public international law. It marks the sometimes gradual, but much more often abrupt, transition from a bygone world, with its classical international law, to the legal world in whose continuity we still live today. International law, as we know and understand it, takes shape and form, consolidates and condenses, during this historical phase between 1919 and 1945. We are no longer familiar with that international law of the past. Reading the old textbooks of the nineteenth century, we feel the disorientation, the rupture, the perplexity.[1] The absence of a law of treaties; the lack of multilateralism; the rudimentary law of responsibility, which is still in its infancy; the distance from the concept of the state, which is not yet defined according to the current quadrilateral of territory, population, government and sovereignty, but according to the particular statuses of different political communities (for example the City of Krakow, the Swiss Confederation, Vatican City and so on); an international law of accepted and allowed predation, the use of force being permitted and its corollaries not being prohibited, such as annexation, unequal treaties or colonialism; the omnipresent principle of consent, with the right of veto of each state in the face of any common enterprise; and more. With the League of Nations

[1] See e.g. Harold Laski, *The Foundations of Sovereignty* (London: George Allen and Unwin 1921) 314: 'Nothing is today more greatly needed than clarity upon ancient notions. Sovereignty, liberty, authority, personality – these are the words of which we want alike the history and the definition; or rather, we want the history because its substance is in fact the definition'.

and its ferments the world we know is instead taking shape: the advent of multilateralism and international co-operation organised at an institutional level; the codification of international law; the formatting of the law of treaties and international responsibility; the establishment of *jus contra bellum*, attempting to repress or at least to limit the right to use force; the emergence of the common interests of states and humanity; modern legal conceptualisations, for example in the configuration of the state, of international organisations, of the role of the individual; the creation of permanent courts with fixed rules of procedure; and so on. In sum, this era marks the transition from the historical to the contemporary, from the *lex extincta* to the *lex lata*.

Of all these evolutions, the most striking is linked to a double aspect. First, the step from anarchy in the use of force, the sign of a society rightly called 'primitive', to a society which frames and reduces the right of each member to use violence for ends which appear only subjectively legitimate. No social progress of any kind can be achieved as long as a society remains bent under the bloody sword of non-centralised violence. The main goal of the League of Nations and of international law at the time was thus to take this giant step from decentralised jurisdiction over the use of force to a regime of policed and institutionalised legitimate violence. The authors were not mistaken. In the words of Georges Scelle, 'The universal war, which for nearly five years bloodied the world, has aroused everywhere the ardent desire for a lasting peace; the need to establish this peace is certain, the possibility of achieving it seems today more likely'.[2] Or again: 'Wherever and whenever the outraged sense of human solidarity could escape from the actual problems of belligerency, it reacted in favor of some form of international organization which would at least make more difficult a repetition of the world disaster'.[3] Second, not only did decision makers have to consider taming violence, but they also had to provide for forms of international governance to meet the needs of growing interdependence, which in turn generated an impressive growth in international law. As has been aptly put, the League of Nations

> was the first effective move toward the organization of a world-wide political and social order, in which the common interests of humanity could be seen and served across the barriers of national tradition, racial difference, or geographical separation. . . . [It was] the embodiment in constitutional form of mankind's aspirations toward peace and toward a rationally organized world.[4]

[2] G. Scelle, *Le Pacte des Nations et sa liaison avec le Traité de Paix* (Paris: L. Tenin 1919) 5.
[3] F. Morley, *The Society of Nations* (Washington: Brookings Institution 1932) 5.
[4] F.P. Walters, *A History of the League of Nations* (London, New York and Toronto: Oxford University Press 1960) 1, 3.

In both of its advances, the era had a profound effect on the international legal order.[5] Hence the break described at the beginning of this Introduction.

The connection of the League and its era with public international law is even deeper than has been suggested so far – not only because of the legalistic approach of the Covenant of the League of Nations, its orientation to 'Peace through Law', its sometimes naïve belief in a kind of strict pre-eminence of law over politics. It is a general truth that law takes root only with difficulty in a society lacking institutions capable of monitoring, guaranteeing and sanctioning. The law supposes a certain verticality to perfect itself; in pure anarchic horizontality, it remains somewhere always valetudinarian and at its vanishing point. As has been asserted with much aptness, 'Any kind of an International Law and some kind or other of a League of Nations are interdependent and correlative'.[6] It is understandable that modern international law – that is to say, international law that is more or less fully equipped with its complete toolkit – could only emerge in this era in which international co-operation has given it the social and institutional substratum that is indispensable for its consolidation and growth.

In this volume, the reader will be able to convince himself or herself of this and retrace the paths of this blossoming and maturation. The most diverse fields of the international legal world will be exposed in order to examine the lines of continuity and tradition and the places of rupture and renewal. The emphasis here is placed on 'diverse'.

In the literature on the League – legal, historical and in political science – the dominant perception is that the League was a failure. This perception is inherited from the contemporaries of the tragic events of the 1930s and was subsequently transmitted to the following generations. It is hard to find an article or a book in which the League is not immediately associated with a feeling of impending doom. The tragic halo of the League is unlikely to completely fade away. Our intention is – and this, we hope, is the red thread bringing together the contributions in the present volume – to reconsider what seems to be the established but simplistic view of failure in all respects. That

[5] As Judge Nolte observed recently in his course at the Hague Academy: 'Why is the story of the First World War, the inter-war period, and that of the League of Nations important? Because it is probably the most important historical case from which the most important treaty of our era, the United Nations Charter, has taken its lessons'. In Georg Nolte, 'Treaties and their practice: symptoms of their rise or decline', *Recueil des cours*, 392 (2018) 205–397, at 245.

[6] L. Oppenheim, *The League of Nations and Its Problems* (London: Longmans, Green & Co. 1919) 6.

the League had all the characteristics of an experiment is hardly in doubt.[7] And it is always easy with hindsight to label an experiment a 'failure' and to relegate it to the dustbin of history with the conviction that the present is wiser, better prepared and immune to the challenges of the past. It is not necessarily so. Those who will be studying the history of present-day international law may pronounce an even harsher judgement on our present system.

As editors, we preferred that the authors of the separate chapters enjoy a maximum of freedom in approaching their task. Thus some chapters focus on the emergence of particular rules and principles; others analyse events or persons; yet a third category deal with ideas and concepts. It is our hope that this diversity reflects the great multiplicity of ideas and approaches during the period under examination. Some links between the various chapters have been explicitly established, but many have remained more or less covert and it is left to the reader to uncover them if he or she wishes so. Perhaps it is unnecessary to mention this, but the volume has no claim to exhaustivity. Many issues, events, people and treaties are not mentioned, as is inevitable. A word can be said about some editorial choices – there is no specific chapter on the law of treaties but this most important source of international law permeates the entire volume. The protection of refugees and the protection of minorities are discussed together because the interaction of these groups is revelatory of some common trends in international law, which conveniently, but also controversially, can be studied under the common label of 'human rights'.

This leads us to one final observation of methodological character. While our objective is not to compare the League to the current international system (normative or institutional), we are mindful that such comparisons are made. Human beings are endowed with historical consciousness and international lawyers are particularly sensitive to the role of history. They constantly search for precedents and their attitude to the ways one has to consider history (in particular the history of international law) is not necessarily the same as the views of professional historians. In this we were guided by the words of Frederick William Maitland, who once wrote, 'Today we study the day before yesterday, in order that yesterday may not paralyse today, and today may not paralyse tomorrow'.[8] In this sense, the lessons of the League era must not be lost for our days. For the contemporaries of the

[7] See e.g. Christian Tams, 'Experiments great and small: centenary reflections on the League of Nations', *German Yearbook of International Law*, 62 (2019) 93–128; Jean d'Aspremont, 'The League of Nations and the power of "experiment narratives" in international institutional law', *International Community Law Review*, 22 (2020) 275–90.

[8] V.V. Veeder, 'Looking for Professor B.E. Nolde', *Jus Gentium*, 3 (2018) 275–80, at 275.

interwar period and their successors, these twenty years were a short parenthesis, a short period of transition from one catastrophe to the next. But the thirty years separating the collapse of the Soviet Union and the Russian aggression against Ukraine can be equally instructive and humbling. For they can teach us that our faith in inevitable progress can be more naïve, feeble and at the same time dangerous than the optimism of the creation of the League.

This volume has been a long project and the pandemic made it even longer. We would like to thank the authors; the general editor, Professor Randall Lesaffer; and Mrs Elizabeth Hanlon and her colleagues at the Cambridge University Press for their patience and dedication.

I

International Law at the Time of the League of Nations

CARLO FOCARELLI

Introduction

What sort of international law was in place after the catastrophe of the First World War?[1] Some major developments had already occurred in the second half of the nineteenth century. The slave trade had been largely abolished, paving the way for international-law rules aimed at protecting human beings as such.[2] Humanitarian considerations, with a view to alleviating the gruesome effects of war, had inspired the establishment of the Red Cross and the making in 1864 of the first ever convention on the protection of the victims of war.[3] Humanitarian and cosmopolitan ideas had inspired the mission of the Institut de droit international founded in 1873.[4] A number of international institutions

[1] For an overall exposition of the history of international law at the time of the League of Nations see e.g. Wilhelm G. Grewe, *The Epochs of International Law* (Berlin and New York: Walter de Gruyter 2000); original: *Epochen der Völkerrechtsgeschichte* (Baden-Baden: Nomos 1984) 677–746; Karl-Heinz Ziegler, *Völkerrechtsgeschichte* (2nd edn, Munich: Verlag C.H. Beck 2007) 193–206; Martti Koskenniemi, 'History of international law, World War I to World War II' in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. 4 (2nd edn, Oxford: Oxford University Press 2012), 925–934; Harald Kleinschmidt, *Geschichte des Völkerrechts in Krieg und Frieden* (Tübingen: Francke Verlag 2013) 421–63; and Stephen C. Neff, *Justice among Nations. A History of International Law* (Cambridge, MA and London: Harvard University Press 2014) 345–94.

[2] See A.Y. Rassam, 'Contemporary forms of slavery and the evolution of the prohibition of slavery and the slave trade under customary international law', *Virginia Journal of International Law*, 39 (1999) 303–52; and David Weissbrodt, 'Slavery' in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. 9 (2nd edn, Oxford: Oxford University Press 2012) 216–25.

[3] See Martha Finnemore, *National Interests in International Society* (Ithaca and London: Cornell University Press 1996) 69–88.

[4] See Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press 2002) 12–19.

had been created, such as International River Commissions[5] and Administrative Unions,[6] as well as regional international organisations such as the Union of the American Republics.

These rules and institutions had emerged within the 'states system' originally built by equal, mutually tolerating, secular European powers sharing a similar political, economic, social, religious and cultural background.[7] In the nineteenth century, the system began to expand globally by spreading the 'state' model outside Europe. At that time international law was applied to 'civilised nations', namely to those states – essentially European, or of European descent and cultural background – that fulfilled a 'standard of civilisation' ultimately reflecting secularised Judaeo-Christian values.[8] While the Ottoman Empire, China and Japan were gradually accepted in the circle of the civilised nations in the second half of the nineteenth and the first decades of the twentieth century, European colonies, protectorates and informal suzerainty were maintained.[9]

The outbreak of the First World War took European intellectuals by surprise.[10] Few, if any, could imagine that an all-out war would break out between European 'civilised' nations. The abolition of the slave trade and the adoption of humanitarian rules of international law aimed at both protecting the victims of war and preventing the most gratuitous acts of warfare in the nineteenth century had convinced political leaders and public opinion that from then on the brutality of war would have involved only 'savage peoples' outside Europe or a European power compelled to defend itself from a savage people's attack. What proved shocking was that the cruellest war ever waged broke out precisely in Europe, between European powers and for an apparently futile motive. One of the most insightful analyses of this

[5] See Edward Krehbiel, 'The European Commission of the Danube: an experiment in international administration', *Political Science Quarterly*, 33 (1918) 38–55.
[6] Paul S. Reinsch, 'International unions and their administration', *American Journal of International Law*, 1 (1907) 579–623.
[7] See Hedley Bull and Adam Watson (eds.), *The Expansion of International Society* (Oxford: Oxford University Press 1985).
[8] Gerrit W. Gong, *The Standard of Civilization in International Society* (Oxford: Clarendon Press 1984); and Ntina Tzouvala, *Capitalism as Civilization. A History of International Law* (Cambridge: Cambridge University Press 2020).
[9] Jörn Axel Kämmerer, 'Colonialism' in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. 2 (2nd edn, Oxford: Oxford University Press 2012) 332–41.
[10] For a detailed history of World War I, see Jörn Leonhard, *Pandora's Box. A History of the First World War* (Cambridge, MA: Belknap Press 2018).

sentiment is owed to Sigmund Freud in an outstanding essay written a few months after the outbreak of the war and published in 1915.[11]

Against this background, international law at the time of the League of Nations (LoN) dealt with a number of key theoretical issues that are still at the core of current international law, such as the legal relevance of individuals and cosmopolitan values,[12] and 'monist' developments in the relationship between international law and domestic law.[13] In the following sections I will provide, first, a general framework taking into account the practice of international law of the time, and second, a sample of the international legal literature of the period concerning a number of key and recurrent topics. Finally, I will briefly summarise a few historical treatments of international law that were recounted at the time in order to show that certain developments in the practice and in the theory had repercussions also in the historical conceptualisations of international law.

Practice

Among the major developments of international law in the interwar period we can count the establishment of universal international organisations (in particular the League of Nations), the self-determination of peoples, the protection of minorities and refugees, the rise of monist and federalist doctrines, the

[11] Sigmund Freud, 'Zeitgemässes über Krieg und Tod' in *Das Unbehagen in der Kultur und andere Kulturtheoretische Schriften* (Frankfurt am Main: Fischer Taschenbuch Verlag 2004); English translation: *The Standard Edition of the Complete Psychological Works of Sigmund Freud* (ed. James Strachey) (London: Vintage 1953) vol. 22, 199–215: 'We were prepared to find that wars between the primitive and the civilized peoples, between the races who are divided by the colour of their skin – wars, even, against and among the nationalities of Europe whose civilization is little developed or has been lost – would occupy mankind for some time to come. But we permitted ourselves to have other hopes. We had expected the great world – dominating nations of white race upon whom the leadership of the human species has fallen, who were known to have world-wide interests as their concern, to whose creative powers were due not only our technical advances towards the control of nature but the artistic and scientific standards of civilization – we had expected these peoples to succeed in discovering another way of settling misunderstandings and conflicts of interest . . . Then the war in which we had refused to believe broke out, and it brought – disillusionment. Not only is it more bloody and more destructive than any war of other days, because of the enormously increased perfection of weapons of attack and defence; it is at least as cruel, as embittered, as implacable as any that has preceded it. It disregards all the restrictions known as International Law, which in peace-time the states had bound themselves to observe'. *Ibid*., 276, 278–9.

[12] For the 'individualistic conception of international personality' in the interwar period and subsequent practice, see Roland Portmann, *Legal Personality in International Law* (Cambridge: Cambridge University Press 2010) 126–72.

[13] Hans Kelsen, *Reine Rechtslehre* [1934] (Tübingen: Mohr Siebeck 2008), English translation: *Introduction to the Problems of Legal Theory* (Oxford: Clarendon Press 1992) 107–25.

regulation of airspace, the peaceful settlement of disputes and the partial prohibition of war, further rules on the conduct of war and the protection of the victims of war, armed reprisals, an early attempt to regulate international terrorism, non-intervention (especially during the Spanish Civil War), and the articulation of a number of principles and rules by way of international jurisdiction and arbitration. This section will provide an overview of these developments, linking them to key historical events of the period, but also establishing bridges with important events, some of which precede the period under examination but are part of the broader context – in particular, the First World War (1914–1918), the 1917 Bolshevik Revolution and the Great Depression (roughly 1929–1939) and the creation of the LoN.

The First World War was significant for the development of international law in several respects. First, the unexpected experience of an all-out war waged by European 'civilised' nations inflicted a serious blow to the notion of civilisation as a standard for admission to the circle of the family of nations. The 'European Age', along with colonial expansion, was coming to an end, replaced by two non-European powers, the United States and the Soviet Union.[14] The decline of the European powers was also apparent in the gradual abolition of treaties imposing extraterritorial jurisdiction in favour of the European 'Great Powers' from 1899 on.[15] Universal concerns – regardless of religious, ideological, cultural and geographical considerations – took hold, a perception reflected in all major multilateral treaties, which often made reference to the 'benefit of mankind'. The idea itself of civilisation became global when the 'civilising mission' of the colonial powers was integrated into the mandates system of the League of Nations[16] and gradually evolved towards universal human rights.[17] Second, the war had left a

[14] John Morris Roberts, *Modern History. From the European Age to the New Global Era* (New York: Oxford University Press 2008).

[15] The first state to conclude treaties ending capitulations was Japan in 1899. In particular, the Montreux Convention Regarding the Abolition of the Capitulations in Egypt of 8 May 1937 led to the abolition of the extraterritorial legal system for foreigners in Egypt (known as the capitulations) 182 *LNTS* 37. See Maurits H. van den Boogert and Kate Fleet (eds.), *The Ottoman Capitulations. Text and Context* (Rome: Istituto per l'Oriente 2003); Maurits H. van den Boogert, *The Capitulations and the Ottoman Legal System. Qadis, Consuls and Beraths in the 18th Century* (Leiden: Brill 2005); and Mark S.W. Hoyle, *Mixed Courts of Egypt* (London: Graham & Trotman 1991).

[16] See Ruth Gordon, 'Mandates' in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, vol. 6 (2nd edn, Oxford: Oxford University Press 2012), 989–1004.

[17] Edward Keene, *Beyond the Anarchical Society. Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press 2002); see also Chapter 16 of the present volume.

world in transition with many hopes and very few certainties. Innumerable international attempts were made at promoting peace and a naïve euphoria spread on the occasion of the establishment of some historic international treaties and institutions. Public opinion, lobbying associations and political leaders believed that international law could ensure international peace and security for humankind through the operation of a world organisation. At the same time, distrust between states was pervasive. Events in Italy and in Germany showed that public opinion could easily be manipulated and led to espouse totalitarianism. No wonder the experience of the interwar period provoked the emergence of a new academic discipline, international relations (IR), with a – realist and down-to-earth – proclivity to warn against utopianism, a sentiment that was later to be regarded as one of the major causes of the Second World War.[18] Third, the dissolution of the Austro-Hungarian Empire and of the German Reich prompted the question of the colonies' fate. The principle of self-determination of peoples was upheld in order to ensure that governments were supported by their peoples.[19] Several smaller (strongly nationalistic) states emerged in Central and South-Eastern Europe. Here, the protection of national minorities was thought to be vital to the maintenance of both domestic and international order.

Another key event was the 1917 Bolshevik Revolution. The revolution sparked an ideological confrontation that lasted throughout the 'short twentieth century'.[20] The Soviet Union, built on principles of Marxism–Leninism – such as atheism, abolition of private property and the progressive suppression of the state – harshly opposed the 'traditional' features of the European 'family of nations', which in principle shared the Christian religion as well as political and economic liberalism. The Soviet Union immediately challenged the very foundations of international law as it then stood.[21] First, it threatened colonial powers by advocating the application of the principle of self-determination of peoples to both national groups in Europe and colonies

[18] Edward H. Carr, *The Twenty Years' Crisis 1919–1939. An Introduction to the Study on International Relations* (London: Macmillan 1939; 2nd edn reprinted Houndmills: Palgrave 2001).
[19] Anthony Whelan, 'Wilsonian self-determination and the Versailles settlement', *International and Comparative Law Quarterly*, 43 (1994) 99–115.
[20] Gabriel Gorodetsky, *Soviet Foreign Policy, 1917–1991. A Retrospective* (London: Routledge 1994).
[21] John N. Hazard, 'The Soviet Union and international law', *Soviet Studies*, 1 (1950) 189–99; W.W. Kulski, 'The Soviet interpretation of international law', *American Journal of International Law*, 49 (1955) 518–34; Kathryn Greenman, Anne Orford, Anna Saunders and Ntina Tzouvala (eds.), *Revolutions in International Law. The Legacies of 1917* (Cambridge: Cambridge University Press 2021).