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## Why History of International Law Today?

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## Abstract

The article presents a brief overview of research and publication in the history of international law in Europe today. The upsurge of interest in historical studies is traced back to a sense of present transformation, with historical studies seeking to explore both aspects of continuity and change in the international legal system. The article outlines three tasks for the discipline in the future: to begin work for international law's *Ideengeschichte*, to focus on the relationship between the West and its »Other«, and to undertake studies in the historical sociology of international law.



## Why History of International Law Today?

### I. *Situation at present*

International law emerged as a specialised profession and a branch of law studies with a chair at universities only in the latter part of the 19th century. Before that, it was usually studied in connection with – and sometimes merged into – diplomatic history or political philosophy. From the outset, its self-understanding was historically informed. This undoubtedly reflected the sense among international lawyers that they were part of a cosmopolitan project that had a long pedigree sometimes derived from Enlightenment philosophy but increasingly from earlier times, from Hugo Grotius, 16th century Spanish humanists or even Stoic cosmopolitanism. Still during the inter-war era, international law was understood and examined in intensely historical terms.

But the collapse of the inter-war order put also to question the well-foundedness of such an orientation. Clearly, the cosmopolitan project – or at least the manner in which it had been conducted – had failed. As in most branches of the law, the increasing specialisation of international law directed attention away from history and general reflection on the profession's past. Pragmatic and instrumental tasks such as supporting the United Nations, construction of an international human rights framework, the development of special rules for trade law, environmental law and work for a proliferating number of international institutions since the 1950's, have left little room for historical studies. For a functionally oriented generation, the past offered mainly problems, and few solutions.

Although little has happened in international legal history in the past half-century, there have also been clear signs of an atmospheric change. Perhaps the most obvious of these was the inauguration of the *European Journal of International Law* in 1990 which from the outset included symposia on the »European tradition in international law«, explorations in the life and writings of some of the more important European internationalists from the first half of the 20th century. The series understood the denomination of »international lawyer« in an appropriate broad fashion, including studies on theorists such as Hans Kelsen and Alf Ross, whose work only occasionally touched upon questions of international law – though when it did, made points of lasting relevance. Many of the studies have been path-breaking in examining their subjects in their political and intellectual context, seeking distance from the formal and sometimes hagiographic tradition of biographical writing in the field.<sup>1</sup>

Another significant event was the inauguration of the *Journal of the History of International Law/Revue d'histoire du droit international* in 1999. The Journal is published twice a year and provides an eclectic forum for writings on different aspects of international legal history from the Roman Empire until the 20th century. It is the first periodical specialised in the field's history and an important competitor to the handful of international relations and diplomatic history periodicals that had published studies in the history of international law so far. Occasional historical pieces have come out in regular international law journals and yearbooks such as, for example, the British, Finnish, German and

1 See *European Journal of International Law* (EJIL) 1 (1990) 193–249 (Gerges Scelle); EJIL 3 (1992) 92–169 (Dionisio Anzilotti), EJIL 6 (1995) 32–115 (Alfred Verdross); EJIL 8 (1997) 215–320 (Hersch Lauterpacht); EJIL 9 (1998) 287–400 (Hans Kelsen) and EJIL 14 (2003) 653–842 (Alf Ross).

Italian Yearbooks of international law as well as the *Annuaire de droit international* in France. Although the Hague Recueil (*Recueil des cours de l'Académie de droit international*, published since 1923) carried historical articles in its early volumes, that practice has been discontinued. Special mention should be made of an increasing interest in international law and the colonial encounter from mid-1980's onwards. Studies on this question in regular law journals in the United States and elsewhere have been of mixed quality but shown a welcome awareness of critical and post-colonial approaches and political orientations of jurisprudence. An extensive (though not exhaustive) bibliography of the history of international law was published in the first issue of the *Journal of the History of International Law*.<sup>2</sup>

Very little has happened in the field of publishing general works. In the English language, the principal general treatment remains Arthur Nussbaum's *A Concise History of the Law of Nations* (2nd ed. 1954). Among more recent specialised works, mention should be made of Alfred Rubin, *Ethics and Authority in International Law* (1997), David J. Bederman's *International Law in Antiquity* (2002) and Brian Simpson's *Human Rights and the End of Empire* (2001). The present author's *Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001) as well as Outi Korhonen's *International Law Situated: An Analysis of the Lawyer's Stance Towards Culture, History and Community* (2000) are inspired by a critical perspective. In the Netherlands, interest in Grotius and the early developments in international law has continued to occupy the historical imagination. J. H. W. Verzijl's massive *International Law in Historical Perspective* (11 volumes 1968 ff.) is still the most comprehensive overview of the

development of the different technical branches of the discipline.

In the French language, interest in the history of international law has been dwindling. Among his many historical studies, Antonio Truyol y Serra came out with *Histoire du droit international public* (1995) – a brief treatment of mainly doctrinal history for student purposes. Notable special works include Peter Haggemacher's *Hugo Grotius et la doctrine de la guerre juste* (1983), a challenging and a wide-ranging interpretative study, as well as Emmanuelle Jouannet's comprehensive *Emer de Vattel et l'émergence doctrinale du droit international classique* (1998). In Italy, a basic work is Bruno Paradisi, *Civitas maxima. Studi di storia del diritto internazionale* (2 vols. 1974). Stefano Mannoni's *Potenza e ragione. La scienza del diritto internazionale nella crisi dell'equilibrio europeo (1870–1914)* (1999) is a provocative analysis of the intellectual beginnings of the profession. Yasuaki Onuma's recent works have focused on the history of Japan's international legal relations. Also of interest is the series of historical interpretations presented in Onuma Yasuaki (Ed.), *A Normative Approach to War: Peace, War and Justice in Hugo Grotius* (1993).

By far the greatest interest in the history of international law has been in the German language area. Among general works of the post-war era mention should be made of the two-volume Ernst Reibstein, *Völkerrecht. Eine Geschichte seiner Ideen in Lehre und Praxis* (1958), Wolfgang Preiser's *Die Völkerrechtsgeschichte, ihre Aufgaben und ihre Methode* (1964) as well as Stephan Verosta's contributions. Wilhelm Grewe's *Epochen der Völkerrechtsgeschichte* (1984) follows – as its name indicates – the realist-epochal tradition and is structurally and in spirit close to Carl Schmitt's

2 PETER MACALISTER-SMITH and JOACHIM SCHWIETZKE, Literature and Documentary Sources relating to the History of Public International Law: An Annotated Bibliographical Survey, in: *Journal of the History of International Law* 1 (1999) 136–212.

*Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1951). Karl-Heinz Ziegler's *Geschichte des Völkerrechts. Ein Studienbuch* (1994) is a concise work for students that follows the »great epochs« tradition. Mathias Schmoeckel's *Die Großraumtheorie: Ein Beitrag zur Geschichte der Völkerrechtswissenschaft im Dritten Reich, insbesondere der Kriegszeit* (1994) is a welcome treatment of a difficult topic. Also other biographically oriented works have been published in Germany. Above all, however, mention should be made of the unprecedented project under Professor Michael Stolleis of the Max-Planck-Institut für europäische Rechtsgeschichte of a series of PhD works in the history of international law in Germany from the late 19th century to the Second World War.<sup>3</sup>

At least two reasons for the recent increase of interest in international law's history are evident. One is constituted of the complex of political transformations that it has become commonplace to call the end of the Cold War. Many have felt that after 1989 it has become »again« possible to continue the cosmopolitan project interrupted by the emergence of totalitarian ideologies in the 1920's and 30's, the Second World War and the rise of the iron curtain. In the absence of an overriding ideological opposition, it has seemed important to examine the past – especially the mindset of 19th century liberal internationalism – in order to find out what aspects of it might still speak to the present. Others have, by contrast, understood the end of the Cold War to mean a final break with the old diplomatic system whose *Grundnorm* had consisted of the sovereign equality and non-intervention and which may have obstructed progressive international transformation. From this perspective, the point of historical studies may have been to provide a

chronology of the vicissitudes of an outdated system so as to exorcise realist State-centrism and to provide a new language of enthusiasm for international lawyers.

Such different reactions to the political transformations articulate two opposite interpretations of the situation of today's international law to its past. One provides a narrative of continuation. Enthusiasm about the possibilities of collective security in the UN after 1989, for example, led to re-examinations of the League of Nations – how might the UN deal with the problems of collective security that finally destroyed the League? Other studies have highlighted the techniques of an internationalised colonialism under the League mandates system or on the management of the nationalities problem under the Versailles arrangement. The Peace Treaty did not succeed in many of the tasks that had been set to it – the realisation of national self-determination, for instance. Studies of these failures have sometimes attempted to provide »lessons« for UN treatment of Third World problems, sometimes to reinvigorate the universalist aims of classical international law.

The narrative of a wholesale break towards the past has given rise to studies aiming to provide a full-scale history of the system of sovereign equality from its inception (usually in Westphalia) through its heyday (the 19th century) to its decline and breakdown in the crises of the 20th century. Under this optic, the Cold War constituted the last gasp of that system. Such histories seek to foreshadow the coming of an altogether different type of international law, perhaps one with greater attention to the needs and status of human beings. Works in this vein often highlight the close ties of modern international law with colonialism and associate its demise with the emergence of human rights law

<sup>3</sup> The first six theses in this series so far published (by Nomos Verlag) are FLORIAN HERRMANN, *Das Standardwerk. Franz von Liszt und das Völkerrecht* (2001); JOCHEN VON BERNSTORFF, *Der Glaube an das universale Recht. Zur Völkerrechtstheorie Hans Kelsens und seiner Schüler* (2001); STEPHANIE STEINLE, *Völkerrecht und Machtpolitik – Georg*

*(2002)*; BETSY RÖBEN, *Johann Caspar Bluntschli, Francis Lieber und das moderne Völkerrecht 1861–1881* (2003); SANDRA LINK, *Ein Realist mit Idealen – Der Völkerrechtler Karl Strupp (1886–1940)* (2003) and PETER K. STECK, *Zwischen Volk und Staat: Das Völkerrechtssubjekt in der deutschen Völkerrechtslehre (1933–1941)* (2003).

as the focal point of liberal legal reform in the international field.

In addition to the sense of an increased political possibility connected with the end of the Cold War, the other factor contributing the emergence of historical studies has undoubtedly been the breakdown of the modernist frame of politics that used to provide a rather optimistic and above all universalistically inclined interpretation of the international world. The twentieth century has been increasingly interpreted in Tzvetan Todorov's terms, as »tentation du bien, mémoire du mal«: The great utopias of modernity not only failed to materialise, the very worst aspects of the 20th century were caused by some of them. A postmodern outlook does not subscribe to the »metanarratives« that provided coherence and direction to historical writing in the past. It does not share the sense that modernity is linked with »progress« or that »progress« could be seized by the liberal humanitarianism that provided an intellectual and ideological basis to international law from late 19th century onwards. From such a perspective, it seems urgent to re-interpret the past in terms of discontinuous »genealogies« that link the problems of a juggernaut-like modernity to choices made in the past and not to some inexorably constraining historical laws. The study of the past then takes the form: »Who is to blame – and what can be done?«

## II. *Future Tasks*

There are at least three directions into which an invigorated study of the history of public international law could profitably develop.

1. *Towards an intellectual history* (Ideengeschichte) of international law. A first task would be a renewed engagement in the intellec-

tual history of international law. So far, historical writing has been predominantly in three styles. (Especially) German writers have produced accounts of the succession of great historical »epochs«, written in a realistic mode and picturing international law as the instrument of the policies of the period's dominating power (Grewe, Schmitt, Ziegler). Another mode of writing has treated the application and development of great principles through successive periods (e.g. Robert Redslob, *Histoire des grands principes du droit des gens depuis l'antiquité jusqu'à la veille de la grande guerre*, 1923). And a third mode has concentrated on individual persons (e.g. Albert G. de La Pradelle, *Maîtres et doctrines du droit des gens*, 2ème édition, 1950). Although useful work has been produced in each of the genres, the methodological and theoretical problems linked with them are evident. Not least of these is the sometimes rather anachronistic treatment of international law as what Judge Holmes would have called a »brooding omnipresence in the sky«, a more or less unchanging and autonomous set of normative ideas, carried by the heroes of the profession slowly through successive »periods« of grandeur and decline.

What would now seem to be needed is to contextualise the legal ideologies or concepts within the intellectual, social, and political environment in which they have operated. Studies by political historians for instance within the »Cambridge School« (Quentin Skinner, Richard Tuck) have thrown important light on the intellectual context in which the discipline's key figures such as the Spanish scholastics or indeed Hugo Grotius produced their works. Though useful, the focus of these studies has been naturally elsewhere than in questions that interest the lawyer and they sometimes suffer from the author's lack of specialised knowledge. Studies on the histor-

ical uses of particular concepts or doctrines should also trace their connections with the parallel concepts and doctrines within neighbouring areas such as private law, international relations or political theory and philosophy. More regard than in the past should be given to internal divisions in the discipline, the way particular concepts or doctrines reflect national, cultural or political differences. A fruitful direction would be also to trace the relations between concepts and doctrines on the one hand, and the development of the images of the profession on the other. Whether the international lawyer is seen predominantly as an »advisor«, »professor« or »judge«, for instance, has a direct bearing on how the relevant law is understood. And it goes almost without saying that in portraying international law's changing relationship to private law, diplomatic history and political philosophy, more use should be taken of specialised studies in those disciplines.

2. *Focus on the West and its »Other«.* Like international law itself, the historiography of international law has been predominantly Eurocentric. General treatments of the field have usually concentrated on the period of European predominance, especially on aspects of the system of sovereign equality set up in the Peace of Westphalia in 1648. Specialised studies have sometimes treated the role of international law in Western Antiquity or in the Roman Empire, but very little attention has been paid to patterns of legal interaction between non-European societies and the West or non-European societies among each other. It is also surprising how little has been written on the relationship of Europe to Non-European territories and peoples. Colonialism and imperialism have been treated as marginal or have sometimes been excluded altogether from the field of international law, defer-

ring them, as was done by the colonial power, to the domestic law of the colonial metropolis. As a result, the treatment of the role of law in imperialism and colonialism has been left for political historians. Although much of their work (for instance by Anthony Pagden or Victor Kiernan) is of direct relevance for international lawyers, it remains little known within the profession.

It is no wonder that an exception to this is constituted by a number of studies by third-world lawyers such as R. P. Anand and T. O. Elias. The principal monographic treatments of international law and colonialism in the English language remain the works by C. H. Alexandrowicz. However, the most comprehensive treatment of the matter is Jörg Fisch, *Die europäische Expansion und das Völkerrecht: Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (1984). Much significant recent work has, however, been carried out in the context of postcolonial and critical legal studies.<sup>4</sup>

3. *Towards a historical sociology of international law.* Standard works in international law have treated the matter in terms of the great epochal transformations, wars, systems of norms, or the works and lives of individual lawyers. There has been virtually no attempt to study international law from the perspective of the sociology of the international system. Whatever little abstraction of the international system has been employed, has been taken from political theory. The depictions of »Westphalian system«, »anarchy«, »Empire« and »international community« have remained abstract ideal-types of international society resulting from armchair generalisation rather than sociological study. A »social history of international law« would be needed to undertake more detailed studies of the connections between different

4 Here I am especially thinking of the work by Antony Anghie, Nathaniel Berman, Anthony Carty, James Tuo Gathii, David Kennedy, Benedict Kingsbury, Outi Korhonen, Liliana Obregon, and Annelise Riles, among others.

historical types of international society and types of normative system connected with them. Another direction for such studies would be to connect the development of normative systems to macro-level economic and social developments. To what extent has the law influenced such developments, to what extent has it been influenced by them? A third direction of historical sociology might connect international law's development to the development of international law as a professional practice. Who have been the international lawyers? How have they been trained? What types of activity have they been engaged in? Have foreign offices followed their opinions? Some of such work already exists, but more would be needed, and from different parts of the world. The possibilities for a historical sociology of international law are, in fact, almost limitless.

At this writing, challenges to traditional public international law come from many directions: the role of private actors in a globalising world economy, unilateralism of the United States, environmental degradation, the persistence of massive poverty and underdevelopment in the Third World, to name just a few. To respond more efficiently to such challenges than it has done so far, international law must expand beyond the »diplomats' law«, legislated within the United Nations and other inter-governmental bodies. Dealing with new problems and new demands of regulation requires a much more thorough understanding of international law's historical roles, and of the highlights and dark sides of the profession's cosmopolitan commitments, than what exists today.

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