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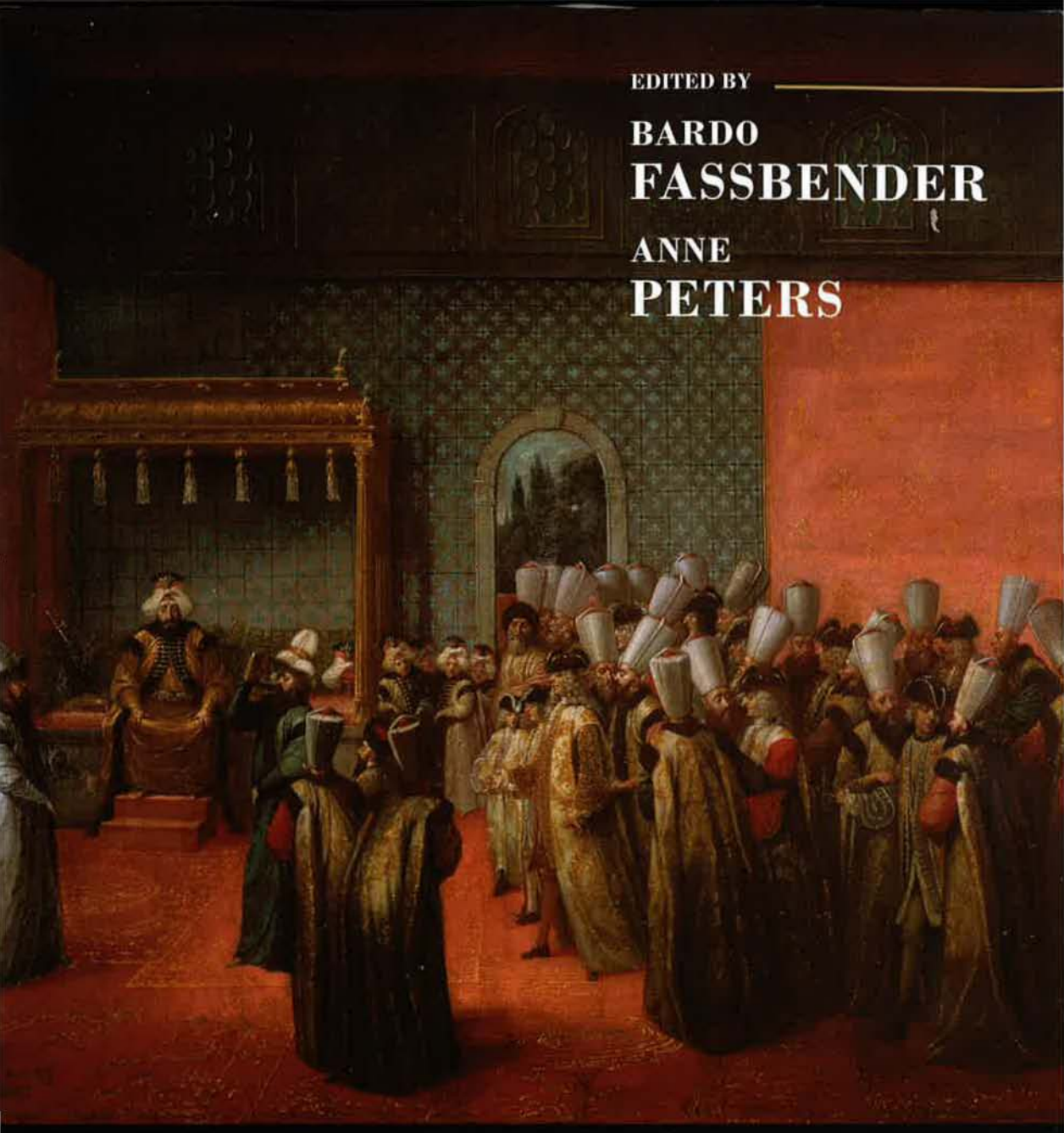

The Oxford Handbook *of* THE HISTORY OF INTERNATIONAL LAW

THE OXFORD HANDBOOK OF

THE HISTORY OF INTERNATIONAL LAW

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CHAPTER 27

FROM THE CONGRESS OF VIENNA TO THE PARIS PEACE TREATIES OF 1919

MILOŠ VEC

1. Introduction

The beginning and the end of the era this chapter deals with are marked by two famous congresses and their subsequent treaties, the localities of which have become their synonyms: Vienna in 1815 and Paris in 1919. In between, numerous smaller gatherings happened in Europe, which dealt with now-forgotten treaties, few wars, and major interventions; Europe externalized its conflicts. International law doctrine developed remarkably. It was the period which has often been regarded as the one in which European jurisprudence had reached its zenith and German lawyers played a great part in this process, particularly with regard to international law.[1] International law as practice and doctrine, formulated by European jurists, spread all over the

[1] M Koskenniemi 'Between Coordination and Constitution: International Law as a German Discipline' (2011) 14 Redescriptions 45–70; A Carty 'The Evolution of International Legal Scholarship in Germany during the Kaiserreich and the Weimarer Republik (1871–1933)' (2007) 50 German Yearbook of International Law 29–90.

world and extended both in regulatory matters and in scope. It was a legitimization narrative for various actions of European and global politics in a century that left its traces on legal thinking and political practice.[2] 'Legitimization narrative' in that sense means that the normative order of international law presupposed justifications while generating them at the same time; the 'legitimization narrative' of international law thus contained possibilities of critique, rejection, and resistance which were beyond the facticity of its juridical positivism.[3]

Not surprisingly, the history of international law has to deal with the problem of Eurocentrism[4] and hegemonic perspectives.[5] Furthermore, the development of 19th-century international law is often attached to some master narratives of modern society. Some of the most famous concepts are universalization, professionalization, the rise of science, juridification/legalization, and positivism. By telling the following story about 19th-century international law, I undertake a critical discussion to see if these assumptions are all true and if so, in what way and at what cost.

2. Conceptual and Doctrinal Foundations and Changes; Expansion of International Law

The 19th century is said to have seen the birth of the modern world; it is the age of 'Die Verwandlung der Welt' as global historian Jürgen Osterhammel[6] put it. International law took part in this big global transformation. Its spread and growing importance was supported by the fact that the 19th century was not only the century of nationalism and the national State, as often told, but also of many internationalisms.[7]

[2] See eg MCR Craven 'What Happened to Unequal Treaties? The Continuities of Informal Empire' in MCR Craven and M Fitzmaurice (eds) *Interrogating the Treaty* (Wolf Legal Publishers Nijmegen 2005) 43–80.

[3] R Forst and K Günther 'Die Herausbildung normativer Ordnungen' (2010) 1 Normative Orders Working Papers 2–3.

[4] M Koskenniemi 'Histories of International Law: Dealing with Eurocentrism' (2011) 19 Rechtsgeschichte 152–76.

[5] A Kemmerer 'The Turning Aside: On International Law and Its History' in RA Miller and RM Bratspies (eds) *Progress in International Law* (Martinus Nijhoff Leiden 2008) 71–93 at 77.

[6] J Osterhammel *Die Verwandlung der Welt. Eine Geschichte des 19. Jahrhunderts* (CH Beck München 2009).

[7] J Paulmann 'Reformer, Experten und Diplomaten: Grundlagen des Internationalismus im 19. Jahrhundert' in H von Thiessen and C Windler (eds) *Akteure der Außenbeziehungen* (Böhlau Köln 2010) 173–97; J Paulmann 'Searching for a "Royal International"' in MH Geyer and J Paulmann (eds) *The Mechanics of Internationalism: Culture, Society, and Politics from the 1840s to the First World War* (OUP Oxford 2001) 145–76.

2.1. Terms and Subjects

First and most evidently, the language of international law changed.[8] Latin ceased to be the language of academic discussions in international law. Only a vanishing minority of authors published some Latin treatises on international law in the 19th century. Moreover, jurists were aware of the problems which the term *ius gentium* would have implied for the labelling of their field of work, and therefore they dropped it. It was Jeremy Bentham who shifted the English denominations from 'law of nations' to 'international law' at the end of the 18th-century.[9] The French, Italian, and Spanish lawyers followed and developed terms which are still valid in the 21st century: *droit international, diritto internazionale,* and *derecho internacional* were sometimes used as substitutes, but in most cases were options for labelling the juridical order between States.

Although Bentham was valued as a legal philosopher by many Germans jurists, the German term *Völkerrecht* persisted. Kant had famously suggested the term *Staatenrecht* (law of States) instead of *Völkerrecht* arguing that not the people but the States were legal subjects in this field of law.[10] Obviously, Kant's doctrine was widely appreciated and discussed in general.[11] Both the idea of freedom as the sole principle of law and law as the foundation of society were enthusiastically welcomed by his contemporaries. International law doctrine was influenced by him, too, yet probably less than other areas of legal thinking. Nobody objected to the idea that this field of law should be named after its subjects, yet under late 18th- and 19th-century international legal doctrine, only States were regarded as subjects of international law. In German, the terms *Volk* and *Staat* were often treated as synonyms; however, with regard to pure doctrine, the term *Staatenrecht* would have been correct. Other authors even suggested terms like *ius cosmopoliticum, ius publicum civitatum, Internationalrecht, Staatsvölkerrecht, äusseres Staatsrecht,* and *internationales Staatsrecht.* Discussion went on for some decades, but language is hard to change, and one of the main 19th-century authorities, Robert von Mohl, was probably right when he concluded that *Staatsrecht* and *Staatenrecht* could be confused acoustically too easily.[12] Thus Germany is one of the countries that still derives the term of the legal doctrine ('Völkerrecht') from the subject this doctrine is dealing with (in the understanding of the 18th and 19th centuries when 'Volk' and 'Staat' were considered identical); this is also the case in the Netherlands

[8] H Steiger 'Völkerrecht' in O Brunner, W Conze, and R Koselleck (eds) *Geschichtliche Grundbegriffe* (Klett Cotta Stuttgart 1992) vol VII, 97–140.

[9] MW Janis 'Jeremy Bentham and the Fashioning of "International Law"' (1984) 78 American Journal of International Law 405–18.

[10] I Kant *Die Metaphysik der Sitten. Erster Theil, metaphysische Anfangsgründe der Rechtslehre* (2nd edn Friedrich Nicolovius Königsberg 1798) at 246.

[11] J Rückert 'Kant-Rezeption in juristischer und politischer Theorie' in MP Thompsen (ed) *John Locke und/and Immanuel Kant* (Duncker & Humblot Berlin 1991) 144–215.

[12] R von Mohl *Encyklopädie der Staatswissenschaften* (2nd edn Laupp Tübingen 1872) at 405.

(*Volkenregt*)[13] and some Scandinavian countries (*Folkeret*).[14] Yet in the French- and English-speaking world, the early modern terms of *droit des gens, droit des nations,* and 'law of nations' can still be used alternatively even though they are less common.

However, other denominations like *droit des peuples, droit des nations,*[15] or *droit public d'Europe,*[16] and *droit public externe/ius publicum externum* vanished at the latest in the early 20th century. Jurists still held the assumption that international order addresses the order of the external relations of the State as opposed to its internal legal system. One of the irritating consequences of the often very radical and clear differentiation was that the interdependencies between both were made invisible. Domestic and foreign policy, national and international law seemed separated and disconnected in this dualism (this doctrine was most prominently and elaborated formulated by Heinrich Triepel in 1899).[17] The connections that exist in reality disappeared and still disappear in these conceptualizations.[18] Whereas most 19th-century authors followed the doctrinal dualism of the 'foreign'/'international' and the 'domestic' quite enthusiastically, at least some of them were aware of the loss such distinctions carried with them.[19] This change in terminology went along with the formation of international law as a juridical discipline not only distinct from other academic subjects but also from other juridical disciplines; according to the majority of the 19th-century maritime law jurists, 'international law' excluded international private law and international criminal law *in extenso.*[20]

These disappearances and transformations marked a slow-going, but deep change in lawyers' perspective. How did that transition work? What instruments were used to achieve it. And how universal were they in terms of the norm?

2.2. A Community of (European) States: Criteria, Inclusions, and Exclusions

Europe was not only in the geographical centre of this legal order but it also defined the criteria of belonging to international society. Classical international law was

[13] G de Wal *Inleiding tot de Wetenschap van het Europesche Volkenregt* (J Oomkens Groningen 1835); H Cock *Natuur- Staats- en Volkenregt* (Lau Leyden 1837).

[14] JLA Kolderup-Rosenvinge *Grundrids af den positive Folkeret* (Gyldendal Kjøbenhavn 1835); H Matzen *Forelaesninger over den positive Folkeret* (JH Schultz Kjøbenhavn 1900).

[15] S Algernon *Discours sur le Gouvernement* (Louis et Henri van Dole La Haye 1702) vol I, at 26.

[16] H Steiger 'Ius publicum Europaeum' in F Jaeger (ed) *Enzyklopädie der Neuzeit* (Metzler Stuttgart 2007) vol 5, 1148–54.

[17] H Triepel *Völkerrecht und Landesrecht* (Hirschfeld Leipzig 1899).

[18] JE Nijman and A Nollkaemper 'Beyond the Divide' in JE Nijman and A Nollkaemper (eds) *New Perspectives on the Divide between National and International Law* (OUP Oxford 2007) 341–60 at 341.

[19] C Frantz *Der Föderalismus* (F Kirchheim Mainz 1879) at 372.

[20] F von Liszt *Das Völkerrecht* (M Fleischmann ed) (12th edn Springer Berlin 1925) at 1.

developed by 17th- and 18th-century European jurists, and understood only States as legitimate subjects of international law. Thus the question of who could be considered as sovereign was crucial to international law. Juridical criteria went together with cultural presuppositions, inclusions, and exclusions. Juridical constructions like federations and confederations as well as dependant political subjects in 19th-century political order were particular challenges.

The European States were seen as independent actors, yet at the same time they formed a legal community which aimed at a very limited integration of outside actors. This idea implied clear rejections of utopian dreams of a universal State—the 18th-century ideas of Wolff, Vattel, and Kant were criticized and sometimes even condemned. The basis and scope of this international community was geographically clear only insofar as the (western and central) European States and the United States of America[21] belonged to this international society; however, its underlying criteria were nevertheless discussed and disputed. Lawyers frequently mentioned the common history and Christian religion of the continent,[22] the existing foundation of treaties and the shared ideas of legal consciousness and mutual recognition as common basis of these countries to form 'the' international society.[23]

Out of this definition two problems arose. Firstly, who belonged technically to this international legal community? The legal status of Russia and the Ottoman Empire posed particular challenges to this issue of European boundaries in the 19th century, yet the latter is said to have been admitted to the international society by the Treaty of Paris in 1856[24] which shifted the criteria of inclusion from 'European' to 'civilized'.[25] Africa and Asia entered the scope of international law, but only few Asian States such as China, Japan, Siam, and Persia were seen as legitimate members of the growing international society. Latin American States seemed to have fewer difficulties in entering. Other actors like Indian tribes or nomad peoples were unanimously seen as being outside this community.

Secondly, the exclusion from the community did not determine how to handle these actors. Doctrine made various proposals and conceptualized different degrees of exclusion and discrimination of what they saw as 'the other', or at least those in a peripheral, position.[26] The practice sometimes went together with these multiple discriminatory concepts as the so-called 'uncivilized' or 'barbarians' were not treated on

[21] MW Janis *America and the Law of Nations, 1776–1939* (OUP Oxford 2010).

[22] CM Kennedy *The Influence of Christianity upon International Law* (Macmillan Cambridge 1856); MF Lucas 'De l'influence et du rôle du christianisme dans la formation du droit international' (1893) Revue des Facultés catholiques de l'Ouest 556–84.

[23] J Fisch *Die europäische Expansion und das Völkerrecht* (Steiner Stuttgart 1984) at 285.

[24] General Treaty for the Re-Establishment of Peace between Austria, France, Great Britain, Prussia, Sardinia, and Turkey, and Russia (signed 30 March 1856) (1856) 114 CTS 409 ('Treaty of Paris').

[25] E Augusti 'The Ottoman Empire at the Congress of Paris' in LB Varela, PG Vega and A Spinosa (eds) *Crossing Legal Cultures* (Meidenbauer München 2009) 503–17.

[26] L Nuzzo 'Un mondo senza nemici. La costruzione del diritto internazionale e il controllo delle differenze' (2009) 38 Quaderni Fiorentini 1311–81.

the basis of reciprocity or full equality (see the practice of the 'unequal treaties') by the 'family of civilized nations'. In other cases, treaty relations were maintained by the Europeans although it was without any doubt that the subjects did not belong to international society.

2.3. Diplomacy and Congresses as Multipartite Political Instruments

The Congress of Vienna established a European order which lasted for some decades and was finally terminated by the Crimean War. Its language referred to 'fraternity' and 'legitimacy' as authoritative narratives which highlighted the personal bonds between the ruling monarchs. Technically, the system based upon diplomacy, international law and the threat of intervention. In the words of Eric Weitz, 'Vienna centered on dynastic legitimacy and state sovereignty with clearly defined borders'.[27] As Mathias Schulz pointed out, the Vienna Concert could be regarded as some kind of 19th-century Security Council.[28] This concept went along with the official approval of political unequality of the state actors because some States established their political hegemony (also) juridically against this background. International lawyers hesitated to approve this political order thoroughly. Instead, they discussed some principles of the Vienna order like the 'balance of power' most critically in terms of their possible juridical content—thus, one may even say that this principle was 'de-juridified'.[29] Only the fight of international law against slavery (see the Declaration of 8 February 1815; Treaty of 20 December 1841),[30] the establishment of the principle of free navigation on rivers (articles 108 and 113), and the dissolution of the problem of the diplomatic ranks of ambassadors and plenipotentiaries[31] were later seen as real advancements of those years.[32]

[27] ED Weitz 'From the Vienna to the Paris System: International Politics and the Entangled Histories of Human Rights, Forced Deportations, and Civilizing Missions' (2008) 113 American Historical Review 1313–43 at 1314.

[28] M Schulz *Normen und Praxis. Das Europäische Konzert der Grossmächte als Sicherheitsrat 1815–60* (Oldenbourg München 2009).

[29] M Vec 'De-Juridifying "Balance of Power"' (2011) European Society of International Law Conference Paper Series <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1968667> (15 February 2012).

[30] Treaty of Vienna Act XV, Declaration Relative to the Universal Abolition of the Slave Trade (concluded 18 February 1815) 63 CTS 473 ('Vienna Treaty'); Treaty of London between Austria, Great Britain, Prussia and Russia for the Suppression of the African Slave Trade (concluded 20 December 1841) 92 CTS 437.

[31] M Vec '"Technische" gegen "symbolische" Verfahrensformen? Die Normierung und Ausdifferenzierung der Gesandtenränge nach der juristischen und politischen Literatur des 18. und 19. Jahrhunderts' in B Stollberg-Rilinger (ed) *Vormoderne politische Verfahren* (Duncker & Humblot Berlin 2001) 559–90.

[32] JC Bluntschli *Das moderne Völkerrecht* (CH Beck Nördlingen 1868) para 312 at 182.

many cases. Jost Dülffer thus pointed out that the European political actors used various diplomatic and legal instruments to prevent wars.[45] Yet this order finally failed in 1914 when the interest in expanding Empires and the mood for starting a war overruled the wish for peace.

2.4. Conferences

The well-known statement that European diplomacy had already used the instrument of multipartite conferences in the 17th and 18th centuries might hide the important observation that this instrument underwent a fundamental change ever since. Congresses and particularly so-called conferences amounted to much more than mere political instruments.[46] With the agglomeration of international relations, these gatherings were used to discuss and handle new topics and themes. They became more frequent, and they attracted not only notorious politicians, jurists, and diplomats, but also professionals from other areas. A symptomatic break can be seen in the first sanitary conference to standardize international quarantine regulations which took place in Paris in 1851.[47] The expression 'more frequent' shall mean here that while conferences were held only once a year in the 1830s, one can count hundreds after 1900—per annum.[48] The impact of the industrial revolution, of technical and scientific improvement in traffic and communication driving this change cannot be underestimated.[49]

2.5. New and Expanding Fields of Regulation

These conferences treated various topics regarding trade, economy, and sciences. Thereby, these fields—including the standardization of weights, measures, and time—also became subjects of international law. The role of consulates, consular law, and consular jurisdiction increased. Older subjects like commerce and the treaties regulating it came into the focus of international law and politics; cooperation became a powerful idea in this field.[50] International society declared war on piracy and abol-

[45] *Vermiedene Kriege* (n 35).

[46] RG Gruber *Internationale Staatenkongresse und Konferenzen* (Puttkammer & Mühlbrecht Berlin 1919).

[47] C Tapia and J Taieb 'Conférences et Congrès Internationaux de 1815 à 1913' (1976) 5 Relations Internationales 11–35 at 31.

[48] ibid 12.

[49] M Vec *Recht und Normierung in der Industriellen Revolution* (Klostermann Frankfurt 2006) 21 ff.

[50] R Pahre *Politics and Trade Cooperation in the Nineteenth Century: The 'Agreeable Customs' of 1815–1914* (CUP Cambridge 2008). See also G Thiemeyer *Internationalimus und Diplomatie. Währungspolitische Kooperationen im europäischen Staatensystem 1865–1900* (Oldenbourg München 2009).

ished privateering formally by the Paris declaration of 1856.[51] More treaties of friendship, trade, and navigation than ever before were concluded. Lawyers, economists, and politicians had high expectations regarding their potential achievement for human societies in general.[52] The discussion on 'free trade' and its consequences displayed antagonistic positions in national economy and international law. Yet it seemed that the various protagonists agreed on the assumption that international law generally worked as an important instrument which they could mobilize for economic goals. This was also true for other fields of growing global entanglements where the progress of human societies led to new internationalisms like cooperations, organizations, institutionalizations, all of them connecting the multiple actors of states and civil societies.

International law had undoubtedly expanded significantly. It gained new challenges for regulations and conferences were the instruments to master them. Many of the issues were efforts to standardize norms that already existed on a national level and also on the international one, helping to facilitate commerce by the reduction of transactions costs; for example in the field of taxes and railroads,[53] or the traffic of sugar.[54] Here, in the field of communications and economy, international cooperation and competition through national and international law-making took place simultaneously.[55]

Yet international law was not only challenged by technical and economic development but philanthropic and moral objectives extended its scope too. Condemnation of slavery (Treaty of Vienna 1815; Treaty between Austria, Great Britain, Prussia, and Russia for the Suppression of the African Slave Trade, 1841) and humanization of warfare (foundation of the Red Cross after the battle of Solferino, 1859; Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field,[56] 1864; Declaration of Brussels,[57] 1874) were included into the agenda of 19th-century international law.[58] Moreover, the first transnational efforts for the exten-

[51] M Kempe *Fluch der Weltmeere—Piraterie, Völkerrecht und internationale Beziehungen 1500–1900* (Campus Frankfurt 2010).

[52] R Klump and M Vec 'Große Erwartungen. Völkerrecht und Weltwirtschaft im 19. Jahrhundert' in R Klump and M Vec (eds) *Völkerrecht und Weltwirtschaft im 19. Jahrhundert* (Nomos Baden-Baden 2012) 1–16.

[53] W Kaufmann *Die mitteleuropäischen Eisenbahnen und das internationale öffentliche Recht* (Duncker & Humblot Leipzig 1893).

[54] W Kaufmann *Welt-Zuckerindustrie* (F Siemenroth Berlin 1904).

[55] G Ambrosius *Regulativer Wettbewerb und koordinative Standardisierung zwischen Staaten* (Franz Steiner Stuttgart 2005); I Hont *Jealousy of Trade. International Competition and the Nation-State in Historical Perspective* (Harvard University Press Cambridge MA 2001).

[56] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (adopted 22 August 1864, entered into force 22 June 1865) 129 CTS 361.

[57] 'Project of an International Declaration Concerning the Laws and Customs of War, adopted by the Conference of Brussels (27 August 1874)' in (1907) 1 American Journal of International Law Supplement 96–103.

[58] F Lentner *Das Recht im Kriege* (LW Seidel & Sohn Wien 1880).

sion of social policy and the welfare State were included into this new field of law.[59] International law fought white-slave traffic (*traité des blanches*)[60] and pornography around 1900, thereby including European civil society's moral perspective aims and transformed its goals into positive regulations and general principles of international law.

These agendas were often not at all or only loosely connected to one another. As a result, those new fields of regulation displayed a fragmentation of the upcoming regulatory agenda of modern international law which followed various needs in a very contingent way.

However, at the same time, both the reach of international law and of the juridification of conflicts of interest were also clearly limited. Efforts to build legal regimes often conflicted with strong political interests to avoid derogating sovereignty in essential fields. This was particularly true for military interests which contradicted wishes for the limitation of the amount of arms (England refusing to limit its fleet)[61] or supported the use of technological innovations notwithstanding their cruelty or particular harmfulness (dumdum or expanding bullets, submarines). Often, the efforts in norm enforcement indicated the (missing) political interest in a consequential juridification of areas like warfare.

2.6. International Organizations

These new fields of regulation developed together with the foundation of a set of international organizations. Yet these organizations were highly limited in their scope as their names clearly indicate; consider for example the Central Commission for the Navigation of the Rhine[62] established in 1815 and often regarded as the first international organization.[63] However, later foundations like the International Committee of the Red Cross (1863) or the Universal Postal Union (1874) sound less particular to us and they brought about a change in the making and the implementation of decisions.[64] Particularly administrative unions were armed with permanent institutions (*bureaux*),[65] limited possibilities of autonomy including

[59] E Francke 'Der internationale Arbeiterschutz' (1904) 10 Jahrbuch der Gehe-Stiftung 35–70.

[60] LA Zapatero 'Vom Kampf gegen die Sklaverei und den Mädchenhandel hin zum Verbot des Menschenhandels' in F von Herzog and U Neumann (eds) *Festschrift für Wilfried Hassemer* (CF Müller Heidelberg 2010) 929–44.

[61] V Ritter-Döring *Zwischen Normierung und Rüstungswettlauf. Die Entwicklung des Seekriegsrechts, 1856–1914* (Nomos Baden-Baden 2012).

[62] M Vec 'Das Prinzip der Verkehrsfreiheit im Völkerrecht' (2008) 30 Zeitschrift für Neuere Rechtsgeschichte 221–41.

[63] B Reinalda *Routledge History of International Organizations* (Routledge London 2009) 3 ff.

[64] CA Riches *Majority Rule in International Organization* (Johns Hopkins Press Baltimore 1940).

[65] G Moynier *Les bureaux internationaux des Unions universelles* (Cherbuliez Genève 1892).

jurisdiction,[66] and even the exercise of coercion. They were the forerunners of modern international organizations, the first of which was the International Telecommunication Union, established in 1865.[67] The Central Commission for the Navigation of the Rhine was established earlier. Also, the Pan-American Conferences founded the International Union of American Republics and agreed in the course of their attempts for regional integration in 1890 on the establishment of an office representing the Union.[68]

Thus, the second conclusion to be drawn is that 19th-century international law led to some institutionalization. There obviously was a kind of international organization before the 'age of international organization' (seen through the eyes of political scientists), yet the foundational change was according to Wolfgang Friedmann,[69] the shift from international law of coexistence to international law of cooperation.

This extended cooperation in state practice went hand in hand with a paradigm shift in international legal theory. Many mid-19th-century authors criticized their forerunners and colleagues for following ideas which no longer suited the current state of international relations. They argued that international legal theory should leave the paradigms of coexistence and sovereignty as major principles. Instead, they should acknowledge the transformation of international relations which had underwent a change to higher cooperation. Thus, the international community should be the new and decisive principle of the discipline. This idea was promoted by Carl von Kaltenborn, Robert von Mohl, Lorenz von Stein, and Fedor Martens,[70] whereas others dismissed it and its related constructions as not sufficiently juridical.[71] Around 1900, the idea of the international community had already been regarded as an epoch in the history of international law. Nevertheless it had revivals in the 20th-century legal and sociological doctrine,[72] and it succeeded in being established as a weighty counterpart to sovereignty with which it has to be balanced in every single case.

[66] S Kneisel *Schiedsgerichtsbarkeit in Internationalen Verwaltungsunionen (1874–1914)* (Nomos Baden-Baden 2009).

[67] M Herren *Internationale Organisationen seit 1865* (Wissenschaftliche Buchgesellschaft Darmstadt 2009).

[68] C Graf Fugger Kirchberg-Weißenhorn *Der Panamerikanismus und das amerikanische Völkerrecht* (GJ Manz München 1931) at 4; R Büchi *Die Geschichte der panamerikanischen Bewegung* (JU Kern Breslau 1914) at 44.

[69] W Friedmann *The Changing Structure of International Law* (Stevens & Sons London 1964) at 60–3.

[70] C Baron von Kaltenborn von Stachau *Kritik des Völkerrechts* (Gustav Mayer Leipzig 1847); R von Mohl 'Die Pflege der internationalen Gemeinschaft als Aufgabe des Völkerrechts' in R von Mohl (ed) *Staatsrecht, Völkerrecht und Politik* (Laupp Tübingen 1860) vol 1, 579–635; W Załęski *Zur Geschichte und Lehre der internationalen Gemeinschaft* (Laakmann Dorpat 1866); L von Stein 'Einige Bemerkungen über das internationale Verwaltungsrecht' (1882) 6 Schmollers Jahrbuch 395–442; F von Martens *Völkerrecht* (C Bergbohm ed) (Weidmann Berlin 1883 and 1886).

[71] P Heilborn *Das System des Völkerrechts* (J Springer Berlin 1896) at 397.

[72] AL Paulus *Die internationale Gemeinschaft im Völkerrecht* (CH Beck München 2001).

3. Positivistic universalization of international law?

However, the often-told story of international law claims more than such a mere expansion of fields of regulation. First, the story supposes a positivistic turn and secondly, a globalization of international law.

3.1. Sources: Treaties, Codification, and International Legislation

Nineteenth-century international law acknowledged a variety of sources of international law, but a formal or official definition comparable to article 38 of the ICJ statute did not exist. Contemporary jurist's classical doctrines listed the following sources: treaties, protocols, and declarations of the great powers, national laws and statutes, jurisdiction of international courts, writings of law teachers and international customary law.[73] Thus, a 'plurality of equivalent sources' with no clear hierarchy was involved in the law-making process which produced a horizontally and vertically pluralistic international order.[74]

In these sources, taken from a leading encyclopaedia of 1870, natural law had already been excluded or had at least been made 'invisible' (as natural law may be regarded to have survived as part of the quoted 'writings of the law teachers'). This separation was a long and complicated process that did not proceed in all discourses at the same speed. Nevertheless, with regard to its sources and methods, the discipline of positivistic jurisprudence was founded after 1800.[75]

At least in Italy and France, the academic culture of jurisprudence promoted the study of international law in the context of natural law until the mid-19th century.[76] Some authors even identified international law with international morality.[77] The

[73] AF Berner 'Völkerrecht' in JC Bluntschli and K Brater (eds) *Deutsches Staats-Wörterbuch* (Expedition des Staats-Wörterbuchs Stuttgart 1870) vol XI, 76–96 at 94–6.

[74] S Besson 'Theorizing the Sources of International Law' in S Besson and J Tasioulas (eds) *The Philosophy of International Law* (OUP Oxford 2010) 163–85 at 164.

[75] J Schröder *Recht als Wissenschaft* (CH Beck München 2001) at 189ff.

[76] The titles for France include G de Rayneval *Institutions du droit de la nature et des gens* (Leblanc Paris 1803); CLS Michel *Considérations nouvelles sur le droit en général* (Delaunay Paris 1813); LB Cotelle *Droit de la Nature et des Gens* (Gobelet Paris 1820); for Italy eg P Baroli *Diritto Naturale Privato E Publico. Volumes V–VI: Diritto Naturale Pubblico Esterno* (Feraboli Cremona 1837).

[77] G Atkinson *International Morality; or, the Touchstone of the Law of Nations* (G Woodfall and Son London 1851); PD Pontsevrez *Cours élémentaire de morale* (Hachette Paris 1886) at 120: 'La morale internationale ou droit des gens'.

frequent reprints or new editions of Vattel and Burlamaqui until the 1860s[78] also demonstrate a vivid interest in natural law doctrine.

However, international legal doctrine developed differently in England. In the early 19th century, the state of legal education was rather poor there and international law was 'essentially directed by practical men'.[79]

Only after 1870 did an 'autonomous' study of international law begin in these nations. Other late 19th-century international legal authors placed explicit natural law ideas in their writing by referring to 'the social' idea or certain values; jurisprudence was thus made ethical in some way. Therefore, it is hard to make a clear distinction between legal positivism and natural law thinking in 19th-century international law;[80] it seems 'that there is no clear distinction to be discerned'.[81] Other exclusions from international law (doctrine) had also left their traces. Since the late Enlightenment, international lawyers had emphasized[82] that international law should clearly be distinguished from international morality[83] or international diplomacy,[84] thus they formalized the discipline. Yet at the same time they refuted the arguments of the so-called deniers of international law. This took largely place in the theory of sources of international law and in their exclusion of legitimate arguments. The 'deniers' claimed that the true and only source of inter-state regulation could be found in the internal legal order of States and therefore they did not accept the idea that an autonomous sphere of international law existed.This position was proclaimed by jurists like Gustav Hugo,[85] Georg Friedrich Puchta,[86] Georg

[78] For two late editions, see JJ Burlamaqui *The Principles of Natural and Politic Law* (J Nourse London 1763, 7th edn JH Riley & Co Columbus Ohio 1859); E de Vattel *Le droit des gens ou principes de la loi naturelle* (Aillaud Paris 1863).

[79] C Sylvest 'The Foundations of Victorian International Law' in D Bell (ed) *Victorian Visions of Global Order* (CUP Cambridge 2007) 47–66 at 50; M Lobban 'English Approaches to International Law in the Nineteenth Century' in MCR Craven, M Fitzmaurice and M Vogiantzi (eds) *Time, History and International Law* (Martinus Nijhoff Leiden 2007) 65–90.

[80] See the paradigmatic case study on Bulmerincq by L Mälksoo 'The Context of International Legal Arguments' (2005) 7 Journal of the History of International Law 181–209 at 208.

[81] C Sylvest 'International Law in Nineteenth-Century Britain' (2004) 75 British Year Book of International Law 9–70 at 12.

[82] DHL von Ompteda *Literatur des gesamten sowohl natürlichen als positiven Völkerrechts. Erster Theil* (Montag Regensburg 1785) at 6.

[83] GF Martens *Einleitung in das positive Europäische Völkerrecht* (Dieterich Göttingen 1796) at ix and 2; C Welcker 'Encyklopädische Uebersicht der Staatswissenschaften' in C von Rotteck and C Welcker (eds) *Staats-Lexikon* (Hammerich Altona 1834) vol 1, 1–42 at 39; AW Heffter *Das Europäische Völkerrecht der Gegenwart* (2nd edn Schroeder Berlin 1848) at iv; LA Warnkönig *Juristische Encyclopädie* (Enke Erlangen 1853) at 557.

[84] Cf F von Liszt *Das Völkerrecht* (5th edn Haering Berlin 1907, 12th edn M Fleischmann ed Springer Berlin 1925) at 117 ('internationale Courtoise' versus 'international law').

[85] G Hugo *Lehrbuch eines civilistischen Cursus* (8th edn August Mylius Berlin 1835) vol 1, at 73.

[86] GF Puchta *Das Gewohnheitsrecht, Erster Theil* (Palm Erlangen 1828) at 142 'man sollte von einer Völker- oder Staatenmoral, aber nicht von einem Völkerrecht sprechen'.

Wilhelm Friedrich Hegel,[87] John Austin,[88] George Cornewall Lewis,[89] Adolf Lasson,[90] and Philipp Zorn.[91] Consequently, some of them such as Hegel and Zorn preferred to use terms like *Außenstaatsrecht* (external public law; *droit public externe*; *diritto pubblico esterno*) instead of 'international law'.

However, the renunciation and separation of international law from natural law doctrine had immediate consequences for the legal sources. Nineteenth-century doctrine avoided evocations of 'natural law' as a legitimate source but it held still valid that 'reason', 'law of reason', 'justice', or 'the nature of things' could work as legal sources or at least as legitimate arguments when discussing the existence of a rule or principle in international law. Thus, the expulsion and extermination of natural law mainly took place in terminology whereas functional equivalents enabled natural law to subsist on a somehow subterranean level.

Nevertheless, with regard to sources both theory and practice started to focus more on empirically observable references in inter-state behaviour like treaties and customary law. The self-understanding of international law reflected this shift in so far as the geographical space and European history gained more weight than in natural law doctrine which constructed its arguments in a universalistic manner. International law was understood as a universal set of norms which was of European origin; the first contributions to the history of international law[92] in the 19th century strongly supported this point. Thus the denomination of the scope of international law changed systematically according to some formula that displayed these historical and geographical references: *droit des gens européen* indicated a culturally founded self-understanding with reference to the continent of its origin[93] to which others explicitly added civilization and Christendom, claiming that their subject could also be named 'Christian law of nations' (*christliches Völkerrecht*).[94] Europe with its customs and political and cultural relations were at the theoretical centre of the emergence of international law.

[87] GFW Hegel *Grundlinien der Philosophie des Rechts* (Nicolaische Buchhandlung Berlin 1821) para 330 and addition 191.

[88] J Austin *The Province of Jurisprudence Determined* (Murray London 1832) at 147 ('*law of nations* or *international law*' is 'a law improperly so called').

[89] GC Lewis *A Treatise on the Methods of Observation and Reasoning in Politics* (Parker London 1852) vol 1, at 44 ('international law is not law in the strict sense').

[90] A Lasson *Princip und Zukunft des Völkerrechts* (Hertz Berlin 1871) at 22.

[91] Cf J Schmidt *Konservative Staatsrechtslehre und Friedenspolitik. Leben und Werk Philipp Zorns* (Aktiv Druck und Verlag Ebelsbach 2001).

[92] R Lesaffer 'International Law and its History: The Story of an Unrequited Love' in *Time, History and International Law* (n 79) 27–41.

[93] KH Lingens 'Europa in der Lehre des "praktischen Völkerrechts"' in I Dingel and M Schnettger (eds) *Auf dem Weg nach Europa* (Vandenhoeck & Ruprecht Göttingen 2010) 173–86.

[94] L Freiherr von Neumann *Grundriss des heutigen europäischen Völkerrechtes* (1st edn Kaiserlich-königliche Hof- und Staatsdruckerei Vienna 1856, 2nd edn W Braumüller Vienna 1877, 3rd edn W Braumüller Vienna 1885).

It is quite clear that international law's expansion and development—or as Isambert, Wheaton, Bluntschli, Pierantoni, Calvo, and others put it prominently in their titles—'progress'[95] had to be founded on treaties; customary law was not an adequate instrument for the emergence of new principles and rules that were needed under this historical-teleological premise. Treaties had to master the regulatory challenge, and many more than ever before were concluded.[96] The number of international agreements grew dramatically. State practice of the earlier centuries which had been only occupied with war and peace seemed poor in comparison. New and extended treaty collections appeared.[97] Fedor Fedorovitch Martens enthusiastically proclaimed a new epoch, the era of 'social-commercial treaties', had begun.[98] Thus good reasons support the claim of the existence of a 'Treaty-Making Revolution of the Nineteenth Century'.[99]

Not only did the frequency, density, and topics of international agreements increase, but the doctrine of treaties also changed. Multipartite (multilateral) open regulatory treaties had been invented as new regulatory model. As legislation in the proper sense was impossible in the 19th century and codification in international law seemed unlikely, these *traités-lois* could serve as a substitute. Famous long-lasting treaties like the one on the Universal Postal Union were concluded. Contemporary jurists praised this model as the beginning of an 'international legislation'[100] or as the beginning of a 'world law'.[101]

In contrast, 'real legislation' was much harder to achieve and it failed in most attempts. Major attempts were made by private individuals, including Francis Lieber (*Instructions for the Government of Armies of the United States in the Field*, 1883), Alphonse de Domin-Petrushevecz (*Précis d'un code du droit international*, 1861), Johann Caspar Bluntschli (*Das moderne Völkerrecht der civilisirten Staaten als Rechtsbuch dargestellt*,

[95] FA Isambert *Tableau des progrès du droit public et du droit des gens* (Paulin Paris 1823); H Wheaton *Histoire des progrès du droit des gens en Europe et en Amérique* (3rd edn Brockhaus Leipzig 1853); JC Bluntschli *Die Bedeutung und die Fortschritte des modernen Völkerrechts* (CG Lüderitz Berlin 1866); A Pierantoni *Il progresso del diritto pubblico e delle genti* (Nicola Zanichelli Modena 1866); C Calvo *Le droit international théorique et pratique précédé d'un exposé historique des progrès de la science du droit des gens* (4 vols 3rd edn Guillaumin Paris 1880–81); S Brie *Die Fortschritte des Völkerrechts seit dem Wiener Congress* (Schletter Breslau 1890); Sir HE Richards *The Progress of International Law and Arbitration* (Clarendon Press Oxford 1911).

[96] M Lachs 'Le développement et les fonctions des traités multilatéraux' (1957) 92 Recueil des cours 226–333 at 233; A Nussbaum *A Concise History of the Law of Nations* (revised edn Macmillan New York 1961) 196–200.

[97] P Macalister-Smith and J Schwietzke 'Literature and Documentary Sources relating to the History of Public International Law' (1999) 1 Journal of the History of International Law 136–212.

[98] *Völkerrecht* (n 70).

[99] E Keene 'The Treaty-Making Revolution of the Nineteenth Century' (2012) 34 International History Review (forthcoming, copy with author).

[100] AS Hershey *The Essentials of International Public Law* (Macmillan New York 1914) at 21; JB Moore 'International Law: Its Present and Future' (1907) 1 American Journal of International Law 11–12 at 12; WG Miller *Lectures on the Philosophy of Law* (C Griffin & co London 1884) at 88.

[101] RL Bridgman *The First Book of World Law* (Ginn Boston 1911).

1868). They were the forerunners of further attempts at codification which were carried out by international institutions, governments, and finally the international community itself, particularly at the Hague Peace Conferences. At these conferences, delegates supported massive attempts to formulate binding agreements on disarmament, peaceful adjustment of international differences, and on the laws and customs of war on land and the regulations annexed thereto. Although the parties failed to find an agreement on reducing and limiting armaments, the procedure and outcome was remarkable—the development of humanitarian principles and peaceful settlement of disputes were prominently set on the agenda of a global community of States.

3.2. Which Positivism? Which Universalism?

In that sense, international laws basis became broader; many new and extended treaties gave a positivistic turn to the factual regulation of international relations. Some of the multipartite treaties were nearly global.

Did this process constitute the development of positivism and universalization? Furthermore, is this development sufficient to label the epoch by using these terms?

The optimistic mood and the progressive narratives among 19th-century international lawyers should not withdraw our attention from the fact that most of the quoted regulations were quite specific in their subject and their objective. Particularly, regarding the issue of positivism, there was little universalism in subject or scope. The Convention on the grape phylloxera of 1882 (vine fretter) is an illustration of that fact.

3.3. Natural Law Lessons

As to the general rules of international relations, where did they come from? Of course, already in the 19th century, international lawyers knew general principles and concepts which could help to conceptualize conflicts and interests.[102] In the 18th century these rules and meta-rules stemmed from moral philosophy and particularly from natural law. This constellation did not really change during the 19th century. Although natural law was abolished terminologically and substituted by legal philosophy and subsequently by legal theory, I find it hard to claim a consequent positivistic turn in the academic field. The new discipline of the theory of international law did indeed refrain from the term 'natural law'. Yet non-positivistic concepts were still held to be the foundation of international law; sometimes they were derived as sub-

[102] M Vec 'Rechtsprinzipien in der Völkerrechtswissenschaft des 19. Jahrhunderts' in R Lieberwirth and H Lück (eds) *Akten des 36. Deutschen Rechtshistorikertages* (Nomos Baden-Baden 2008) 445–63.

sidiaries from Roman law, sometimes from private law. However, most authors like Heffter[103] or Wheaton still referred freely to the axioms of learned German *ius publicum universale*; they refreshed the easier accessible European enlightenment writings of Burlamaqui, Vattel, and Wolff, who were Grotius' successors. A field where this fact is borne out was the so-called fundamental rights and duties of States.[104] Thus one needs to consider to what extent universalization and positivism mutually excluded each other in 19th-century international law.

4. Juridification

It is considered more correct to speak of a juridification of international relations which occurred in 19th century without any precedence. International law's expansion into new subjects and the emergence of new regulatory regimes have already been mentioned.

4.1. Disciplinary Shifts

This process went hand in hand with disciplinary shifts. Jurists excluded other disciplines in the construction of international law and international order. They gained, for example, a monopoly on the definition of peace. International law obtained importance with the new tasks; its voice became stronger; and it strove for autonomy with respect to other legal and non-legal disciplines.

4.2. Proximity and Distance to Politics

At the same time, international law sought both proximity to and distance from politics. Proximity meant that counselling should be useful for the defence of States' rights, for power politics, and various other objectives. Simultaneously, distance was emphasized to underline the autonomy of the legal and academic viewpoint.

[103] IJ Hueck 'Pragmatism, Positivism and Hegelianism in the Nineteenth Century' in M Stolleis and M Yanagihara (eds) *East Asian and European Perspectives on International Law* (Nomos Baden-Baden 2004) 41–55.

[104] M Vec 'Grundrechte der Staaten. Die Tradierung des Natur- und Völkerrechts der Aufklärung' (2011) 18 Rechtsgeschichte 66–94.

International law should be something different from the affirmation of inter-state practice. It claimed to be a distinct justification narrative (*Rechtfertigungsnarrativ*)[105] that implied the possibility of critique through selective, fragmented construction of justification. International lawyers thus tried to draw a sharp distinction between international law and political science.[106]

4.3. Flexible Legal Doctrines

Constructions like 'sovereignty' were part of larger juridical systems; they had to be consistent according to the methodological standards of the discipline. Thus, these discourses on key concepts and general principles of international law served to guarantee the coherence of the discipline.

Yet at first glance the constructions and the key concepts often sounded clearer than they really were. Theory was often very flexible and it voluntarily left space for interpretations and exceptions.[107] Classical international legal doctrine created procedural law 'instead of proposing material rules'.[108] Furthermore, the implementation of norms served both as a challenge to and the possibility of adopting standards like 'equality' to the needs of so-called real international life with its hegemonic structures. In 'real international life' the claim of pre-eminence obviously had a long juridical and political tradition which let this effort seem legitimate. Thus key concepts and general principles of international law contributed not only to the coherence but also 'to complementing international law and *filling its gaps*'.[109]

4.4. International Judiciary and Arbitration

This juridification went along with an 'enthusiasm for the international judiciary and for arbitration'.[110] Contemporaries understood the successful dispute settlement between Britain and the United States in the Alabama case in 1872 as a highlight

[105] 'Die Herausbildung normativer Ordnungen' (n 3) 10.

[106] *Literatur des gesamten sowohl natürlichen als positiven Völkerrechts* (n 82) para 2, at 6.

[107] L Benton 'From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870–1900' (2008) 26 Law and History Review 595–619.

[108] *From Apology to Utopia* (n 39) 155.

[109] S Besson 'General Principles in International Law—Whose Principles?' in S Besson and P Pichonnaz (eds) *Les principes en droit européen—Principles in European Law* (Schulthess Zürich 2011) 21–68 at 49 (original emphasis).

[110] D Kennedy 'International Law and the Nineteenth Century: History of an Illusion' (1996) 65 Nordic Journal International Law 385–420 at 415.

of international arbitration. The essential use of international arbitration is said to have been reborn with the Jay Treaty in 1794. This is, however, a historically rather questionable perception.[111] Yet the Alabama case initiated high expectations for the instrument of international dispute settlement which were shared both by lawyers and public opinion and which intensified around 1900 when the Hague Peace Conferences appeared as the culminating point in a cultural development where political realism and pacifist hopes met. International law became increasingly ethically focused in these years. Instead of the very formal and technical perspective of its classical early 19th-century masterminds like Martens or Klüber, the interest in incorporating moral rules and values grew remarkably around the turn to the 20th century.

4.5. Leeway for Non-juridification

Yet there were also areas where international law was hardly admitted as a regulatory instrument like the regulation of state debts[112] or the consequent interdiction of force. The question of avoidance of law would be an interesting topic to research.

Hence, juridification of international relations had many limits. It is thus necessary to distinguish carefully between different regulatory regimes; any generalizations on the interrelation of law and politics in the 19th century can only be overly fussy. Consular jurisdiction[113] or mixed tribunals and colonial international law[114] showed clearly how juridical systems could be used for political ends and how they altered political orders. In the colonial context, acquisition and possession of land were justified by conferences, treaties (Berlin 1884–85), and legal doctrines ('terra nullius'; *occupatio*) that combined the belief in correct juridical procedures with political interests for territorial rights abroad. Political power was not only disciplined by international law but the latter was also used widely for politics' interests which thus shaped laws' language and axioms.[115]

[111] K-H Lingens 'Der Jay-Vertrag (1794) als Geburtsstunde der modernen internationalen Schiedsgerichtsbarkeit?' in *Les conflits entre peuples* (n 34) 65–82.

[112] L Heimbeck 'Das Gleichgewicht wahren' *Frankfurter Allgemeine Zeitung* (Frankfurt Germany 29 December 2011) 8.

[113] J Berchtold *Recht und Gerechtigkeit in der Konsulargerichtsbarkeit. Britische Exterritorialität im osmanischen Reich 1825–1914* (Oldenbourg München 2009); J Ulbert and L Pijac (eds) *Consuls et services consulaires au XIXe siècle* (DOBU Hamburg 2010).

[114] L Nuzzo 'Kolonialrecht' (2011) European History Online (EGO) <http://www.ieg-ego.eu/nuzzol-2011-de> (15 February 2012); L Nuzzo *Origini di una Scienza. Diritto internazionale e colonialismo nel XIX secolo* (Klostermann Frankfurt 2012); L Nuzzo 'A Dark Side of the Western Legal Modernity: The Colonial Law and Its Subject' (2011) 33 Zeitschrift für neuere Rechtsgeschichte 205–22.

[115] A Anghie *Imperialism, Sovereignty and the Making of International Law* (CUP Cambridge 2005).

5. The rise of science and professionalization

The doctrine of international law expanded enormously in the 19th century. I have not described this expansion in any detail as it would take too much space to do it justice. One should consider the development regarding textbooks,[116] treaty collections, journals (Revue de droit international et de législation comparée, 1869; Revue générale de droit international public, 1894),[117] the increase of teaching of international law, the foundation of chairs and institutes at universities and international academic institutions (Institut de Droit international and Association for the Reform and Codification of International Law, later International Law Association, both founded in 1873).[118] A growing European-American community of international lawyers was happy about this development and their institutionalized ambition was 'de devenir l'organe de la conscience juridique du monde civilisé'.[119] This reference to a plurality of political entities did not preclude loyalty to particular European States and their interests.

On the one hand, leading lawyers from overseas like Andres Bello, Henry Wheaton, and Carlos Calvo promoted European legal doctrine. Thus, they took an active part in the globalization and globalization of international law.[120] On the other hand, they converted these standards in favour of their particular political interests, like the promotion of Latin American independency or rather the construction of regional international law in the case of Alejandro Alvarez. The history of international law as a research subject was born; the myth of its birth in 1648 was further manifested in various disciplines.[121]

Yet at the same time jurists still excluded some areas from public international law. Around the turn of the century they claimed that international private law and

[116] 'Literature and Documentary Sources' (n 97); P Macalister-Smith and J Schwietzke 'Bibliography of the Textbooks and Comprehensive Treatises on Positive International Law of the 19th Century' (2001) 3 Journal of the History of International Law 75–142.

[117] IJ Hueck 'Die Gründung völkerrechtlicher Zeitschriften in Deutschland im internationalen Vergleich' in M Stolleis (ed) *Juristische Zeitschriften* (Klostermann Frankfurt 1999) 379–420.

[118] G Rolin-Jaequemyns 'De la nécessité d'organiser une institution scientifique permanente pour favoriser l'étude et le progrès du droit international' (1873) 5 Revue de droit international et de législation comparée 463–91; AH Fried 'Organisiert die Welt!' (1906) 8 Die Friedens-Warte 1–3.

[119] art 1 of the *Institute de Droit International's* 1873 Statute.

[120] A Becker Lorca 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation' (2010) 51 Harvard International Law Journal 475–552; S Kroll Normgenese *durch Re-Interpretation—China und das europäische Völkerrecht im 19. und 20. Jahrhundert* (Nomos Baden-Baden 2012); UM Zachmann *Krieg und Ordnungsdenken im völkerrechtlichen Diskurs Japans 1919–60* (Nomos Baden-Baden 2012).

[121] A Osiander 'Sovereignty, International Relations, and the Westphalian Myth' (2011) 55 International Organization 251–87 at 265.

international criminal law were no longer a part of the discipline. Their perspective was historical, practical, and positivistic. This self-perception was thus true insofar as lawyers referred to European history and rejected utopian ideas. Eternal peace and *civitas maxima* were no popular visions for a regular international lawyer. Nevertheless, values and political ideas still played a role in their writings. 'International morality', *moralité internationale* was sometimes even used as synonym for international law.[122] Today, many of these ideas do not come across very sympathetic from a political point of view. Whereas some protagonists might be labelled as liberal internationalists,[123] this hardly works with others. Furthermore, whereas some authors followed a very technical concept of international law, others devote their legal systems emphatically to ideas like 'international community'—these trends also changed over time. Yet these concepts often meant nothing but Christendom, culture, and civilization, with negative connotations for each.[124] The use of force was seen as legitimate instrument to distribute these aims universally; the terra nullius doctrine constituted an option for expansion.

As the First World War began, many international lawyers were nationalist supporters of their respective countries. Violations of norms were justified, enemies were slandered. International law discourse was intensified through the needs and wishes of the situation. Hence, international cooperation was terminated with some countries while simultaneously intensified with others.

The Paris treaties constructed a very different order than the one which had been designed in Vienna; the old order was dismissed and new principles like self-determination[125] offered a chance of bringing 'just peace' to all peoples and of distributing the burden of war to the culprits.

The set of rules and norms called international law gained more density, coherence, and relevance in the 19th century. However, a single treaty that could serve or be interpreted as a European constitution did not exist. Treaties and academic writing took up many tasks and tried to resolve them in the framework of the political,

[122] G Atkinson *International Morality; or, the Touchstone of the Law of Nations* (G Woodfall and Son London 1851); PD Pontsevrez *Cours élémentaire de morale* (Hachette Paris 1886) at 120 ('La morale internationale ou droit des gens').

[123] M Koskenniemi *The Gentle Civilizer of Nations* (CUP Cambridge 2001) at 4.

[124] E Keene *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (CUP Cambridge 2002) at 109–19; G Gozzi *Diritti e civiltà. Storia e filosofia del diritto internazionale* (Il Mulino Bologna 2010) at 133–66; GW Gong *The Standard of 'Civilization' in International Society* (Clarendon Press Oxford 1984); B Bowden *The Empire of Civilization: The Evolution of an Imperial Idea* (University of Chicago Press Chicago 2009); J Osterhammel '"The Great Work of Uplifting Mankind": Zivilisierungsmission und Moderne' in J Osterhammel and Boris Barth (eds) *Zivilisierungsmissionen* (UVK Konstanz 2005) 363–425.

[125] J Fisch *Das Selbstbestimmungsrecht der Völker* (CH Beck München 2010); J Fisch (ed) *Die Verteilung der Welt. Selbstbestimmung und das Selbstbestimmungsrecht der Völker. The World Divided: Self-Determination and the Right of Peoples to Self-Determination* (Oldenbourg München 2011); L Palleit *Völkerrecht und Selbstbestimmung. Zum Begriff des Selbstbestimmungsrechts der Völker in der deutschen und österreichischen Völkerrechtswissenschaft 1918–33* (Nomos Baden-Baden 2008).

social, and economic surroundings. Many inter-state regulations looked very specific; the growth of positive treaty law did not take place in all fields with identical speed. Nevertheless, some general rules and principles were identified by international lawyers and the political actors. These general rules can be understood as foundations, elements, and forerunners of a global legal constitution, a constitutionalization of international law *avant la lettre*. Yet, the leading idea which was promoted was not necessarily the rule of law. Around 1900 lawyers primarily aimed at 'organization'.[126] International law and international order was to bring to a higher degree of integration through 'organization' which was understood as the genesis of new rules and institutions in various fields.[127] In particularly, international administration was an area where wishes for more intensive state cooperation ('internationalism') met with contemporary political realities.[128] Thus the new field of international administrative law, promoted by von Stein,[129] Martens and others, received a high degree of acceptance or even enthusiasm by other international lawyers. Its assumption also embraced the hope that this form of pragmatic internationalism would help to promote peaceful cooperation and prevent war. This was one of 19th-century international lawyer's illusions[130] as the outbreak of the First World War showed. At least, many of the cooperative endeavours endured wartime and were transformed into the legal and political system of the League of Nations in the inter-war period.

6. Conclusion

Europe was a political and legal community with much ambivalence, many tensions, and a lot of common interests during the 19th century. This statement sounds trivial but it illustrates how hard it is to combine internationalism, imperialism, and law in the period of the so-called first globalization. International law and its makers contributed a lion's share to this process. On the one hand law expanded and favoured a juridification of international relations; yet simultaneously some doctrines discrimin ated particular actors structurally.

[126] P Kazansky 'Les premiers éléments de l'organisation universelle' (1897) 29 Revue de droit international et de législation comparée 238–47; E Duplessix *L'Organisation Internationale* (Larose & Forcel Paris 1909); W Schücking *Die Organisation der Welt* (Kröner Leipzig 1909).

[127] PS Reinsch *Public International Unions* (Ginn and Co Boston and London 1911).

[128] J Claveirole *L'Internationalisme et l'Organisation Internationale Administrative* (Waton Saint-Étienne 1910).

[129] 'Einige Bemerkungen' (n 70).

[130] 'International Law and the Nineteenth Century' (n 110) 385–420.

Telling this story, one has to be aware of the specifics of this normative order. Compared to other fields of law, institutions in international law seemed weak, conflict resolution through courts poor, and legislation a joke. However, legal history has to refrain from traditional 19th-century state-centred categories and it should be pointed out the irritating legal and normative pluralism which can be found in international relations in all epochs, and which I would call 'multinormativity' (*Multinormativität*[131]).

In our days, the nation-state and its statutory law are no longer at the centre of legal theory; modern legal theory encourages instead a fragmented system of national, international, and private norms.[132] Legal history can contribute to the awareness that the self-perception of 19th-century international lawyers is not always accurate. The assumption of a general process of positivism cannot be maintained. Progress and peace were ideologies and normative expansion and juridification of international relations were complex movements which crept towards our modernity.

Recommended Reading

Anghie, Anthony *Imperialism, Sovereignty and the Making of International Law* (CUP Cambridge 2005).

Dülffer, Jost *Regeln gegen den Krieg? Die Haager Friedenskonferenzen von 1899 und 1907 in der internationalen Politik* (Ullstein Frankfurt am Main 1978).

Dülffer, Jost, Martin Kröger, and Rolf-Harald Wippich *Vermiedene Kriege: Deeskalation von Konflikten der Großmächte zwischen Krimkrieg und Erstem Weltkrieg* (Oldenbourg München 1997).

Fisch, Jörg *Die europäische Expansion und das Völkerrecht: Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (Steiner Stuttgart 1984).

Kennedy, David 'International Law and the Nineteenth Century: History of an Illusion' (1996) 65 Nordic Journal International Law 385–420.

Koskenniemi, Martti *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP Cambridge 2001).

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

Schulz, Matthias *Normen und Praxis. Das Europäische Konzert der Großmächte als Sicherheitsrat, 1815–60* (Oldenbourg München 2009).

[131] M Vec 'Multinormativität in der Rechtsgeschichte' (2008) 16 Jahrbuch der Berlin-Brandenburgischen Akademie der Wissenschaften 155–66.

[132] U Sieber 'Rechtliche Ordnung in einer globalen Welt. Die Entwicklung zu einem fragmentierten System von nationalen, internationalen und privaten Normen' (2010) 41 Rechtstheorie 151–98.

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