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THE GROTIAN TRADITION REVISITED: CHANGE AND CONTINUITY IN THE HISTORY OF INTERNATIONAL LAW*

By RANDALL LESAFFER[†]

I. EPOCHS AND TRADITIONS OF INTERNATIONAL LAW

For a long time, the history of the law of nations has been neglected by legal historians and over-simplified and distorted by international lawyers.¹ First, international lawyers as well as legal historians generally accepted that the history of the law of nations became only relevant once the modern sovereign State was in place. For a long time, the early seventeenth century was considered the period in which the modern law of nations took shape. Grotius's *De Iure Belli ac Pacis Libri Tres* (1625)² and

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¹ For an explanation of this neglect: Johan H. W. Verzijl, *International Law in Historical Perspective* (Leiden, 1968) vol. 1, pp. 400–34. For a recent *status quaestionis*: Ingo Hueck, 'The Discipline of the History of International Law', *Journal of the History of International Law*, 3 (2001) pp. 195–217.

² Maurice Bourquin even called Grotius the father of the law of nations: 'Grotius est-il le père du droit des gens?', in *Grandes figures et grandes œuvres juridiques* (Geneva, 1948) pp. 77–99. See also: Charles Calvo, *Le droit international. Théorie et pratique* (Paris, 1896) vol. 1, pp. 52–5; Lassa Oppenheim, *International Law: a Treatise* (London, 1905) pp. 58–9; A. Rivier, 'Literaturhistorische Übersicht der Systeme und Theorien des Völkerrechts seit Grotius', in Franz von Holtzendorff (ed.), *Handbuch des Völkerrechts* (Berlin, 1885) pp. 395–6; Walter Simons, *The Evolution of International Public Law in Europe since Grotius* (New Haven and London, 1931) pp. 4–5; Willem van de Vlugt, 'L'œuvre de Grotius et son influence sur le développement du droit international', *Recueil des Cours de l'Académie de Droit International*, 66 (1938) pp. 400–9. Nowadays his title is under discussion, e.g. by Grewe and Peter Haggénmacher, while Preiser and Ziegler still considered it justified: Wilhelm G. Grewe, 'Grotius—Vater des Völkerrechts', *Der Staat*, 23 (1984) pp. 161–78; Peter Haggénmacher, *Grotius et la doctrine de la guerre juste* (Paris, 1983) p. 622; idem, 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture', in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds.), *Grotius and International Relations* (2nd edn., Oxford, 1992) pp. 133–76; Wolfgang Preiser, 'History of the Law of Nations: Ancient Times to 1648', in Rudolf Bernhardt (ed.), *Encyclopaedia of Public International Law* (Amsterdam, 1995) vol. 2, p. 155; Karl-Heinz Ziegler, 'Hugo Grotius als Vater des Völkerrechts', in Peter Selmer and Ingo von Münch (eds.), *Gedächtnisschrift für Wolfgang Martens* (Berlin and New York, 1987) pp. 851–8; idem, 'Die Bedeutung von Hugo Grotius für das Völkerrecht—Versuch einer Bilanz am Ende des 20. Jahrhunderts', *Zeitschrift für Historische Forschung*, 13 (1996) pp. 354–71. For a very recent overview of early modern doctrine: Heinhard Steiger, 'Ius bändigt Mars. Das klassische Völkerrecht und seine Wissenschaft als frühneuzeitliche Kulturercheinung', in Ronald G. Asch, Wulf Eckart Voss and Martin Wrede (eds.), *Frieden und Krieg in der Frühen Neuzeit. Die europäische Staatenordnung und die aussereuropäische Welt* (Munich, 2001) pp. 59–85.

the Westphalia Peace Treaties of 1648³ were indicated as the birth certificates of the modern law of nations. From the end of the nineteenth century and the early decades of the twentieth century on, the role of some sixteenth-century writers like the neo-scholastics Francisco de Vitoria (ca. 1480–1546) and Francisco Suarez (1548–1617) or the Roman lawyer Albericus Gentilis (1552–1608) was revalued.⁴ Under the impact of the

³ e.g.: 'The peace of Westphalia 1648, may be chosen as the epoch from which to deduce the history of the modern science of international law' in Henry Wheaton, *History of the Law of Nations in Europe and America from the Earliest Times to the Treaty of Washington* (New York, 1845) p. 69. See also: Abi-Saab, 'Whither the International Community?', *European Journal of International Law*, 9 (1998) pp. 250–1; Calvo (above, n. 2) pp. 35–7; Antonio Cassese, *International Law* (Oxford, 2001) p. 21 (with more care for historical accuracy and counterargument than many other international lawyers); Richard A. Falk, 'The Interplay of Westphalia and Charter Conceptions of International Legal Order', in Falk and Cyril E. Black (eds.), *The Future of the International Legal Order* (Princeton, 1969) vol. 1, pp. 43–8; Paul Fauchille, *Traité de droit international public* (8th edn., Paris, 1921) vol. 1–1, p. 75; Leo Gross, 'The Peace of Westphalia, 1648–1948', *American Journal of International Law*, 42 (1948) pp. 20–41; Otto Kimminich, 'Die Entstehung des neuzeitlichen Völkerrechts' in Iring Fetscher and Herfried Münkler (eds.), *Handbuch der politischen Ideen* (Munich, 1985) vol. 3, pp. 73–100; Franz von Liszt and Max Fleischmann, *Das Völkerrecht systematisch dargestellt* (Berlin, 1925) p. 21–2; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th edn., London and New York, 1997) pp. 9–11; Arthur Nussbaum, *A Concise History of the Law of Nations* (New York, 1947) p. 86; Andrea Rapisardi Mirabelli, 'Le congrès de Westphalie. Ses négociations et ses résultats au point de vue de l'histoire de gens', *Bibliotheca Visseriana Dissertationum Ius Internationale Illustrantium*, 20 (1929) pp. 7–18; Robert Redslob, *Histoire des grands principes du droit des gens* (Paris, 1923) p. 213; Ernst Reibstein, 'Das europäische öffentliche Recht, 1648–1815', *Archiv des Völkerrechts*, 8 (1959/1960) pp. 385–420; Nico Schrijver, 'The Changing Nature of State Sovereignty', this *Year Book*, 70 (1999) pp. 65–9; Antonio Truyol y Serra, *Histoire du droit international public* (Paris, 1995) p. 95; A. Wegner, *Geschichte des Völkerrechts* (Stuttgart, 1936) vol. 1, p. 173. Recently the 'Westphalian myth' has been challenged: Stéphane Beaulac, 'The Westphalian Legal Orthodoxy—Myth or Reality?', *Journal of the History of International Law*, 2 (2000) pp. 148–77; Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty', *International History Review*, 21 (1999) pp. 569–91; Arthur Eyffinger, 'Europe in the Balance: An Appraisal of the Westphalian System', *Netherlands International Law Review*, 45 (1998) pp. 161–87; Peter Haggénmacher, 'La paix dans le pensée de Grotius', in Lucien Bély (ed.), *L'Europe des traités de Westphalie. Esprit de diplomatie et diplomatie de l'esprit* (Paris, 2000) esp. pp. 68–9; Randall Lesaffer, 'The Westphalian Peace Treaties and the Development of the Tradition of Great European Peace Settlements prior to 1648', *Grotiana*, new series 18 (1997) pp. 71–95; Andreas Osiander, 'Sovereignty, International Relations and the Westphalian Myth', *International Organization*, 55 (2001) pp. 251–87; Meinhard Schröder, 'Der Westfälische Friede—eine Epochengrenze in der Völkerrechtseentwicklung', in Schröder (ed.), *350 Jahre Westfälischer Friede. Verfassungsgeschichte, Staatskirchenrecht, Völkerrechtsgeschichte*, Schriften zur europäischen Rechts- und Verfassungsgeschichte (Berlin, 1999) vol. 30, pp. 119–37; Heinhard Steiger, 'Der Westfälischen Frieden—Grundgesetz für Europa?', in Heinz Duchhardt (ed.), *Der Westfälische Friede. Diplomatie, politische Zäsur, kulturelles Umfeld, Rezeptionsgeschichte* (Munich, 1998) pp. 33–80; Karl-Heinz Ziegler, 'Die Bedeutung des Westfälischen Friedens von 1648 für das europäische Völkerrecht', *Archiv des Völkerrechts*, 37 (1999) pp. 129–51; idem, 'Der Westfälischen Frieden von 1648 in der Geschichte des Völkerrechts', in Schröder (ed.), *350 Jahre Westfälischer Friede*, pp. 99–117.

⁴ Joseph Kohler, 'Die spanische Naturrechtslehrer des 16. und 17. Jahrhunderts', *Archiv für Rechts- und Wirtschaftsphilosophie*, 10 (1916/1917) pp. 235–63; Ernest Nys, *Le droit de la guerre et les précurseurs de Grotius* (Brussels, 1882); James Brown Scott, *The Spanish Origin of International Law. Francisco de Vitoria and his Law of Nations* (Oxford and London, 1934); Carl von Kaltenborn, *Die Vorläufer des Hugo Grotius auf dem Gebiete des Jus Naturae et Gentium* (Leipzig, 1848); Thomas A. Walker, *A History of the Law of Nations* (Cambridge, 1899) vol. 1. On Scott's role in the 'rediscovery' of Vitoria and Suarez: Christopher R. Rossi, *Broken Chain of Being. James Brown Scott and the Origins of Modern International Law* (The Hague, London and Boston, 1998).

reappraisal of the cultural, social and political upheaval, which marked the twelfth and thirteenth centuries—the Renaissance of the Twelfth Century⁵—some legal historians even moved back the origins of the modern State to the late Middle Ages.⁶ By and large, international legal historians and international lawyers do not look further back than four to seven centuries, while their scope is limited to the Latin part of Europe.⁷

Second, the traditional assessment of the modern States system and the modern law of nations even led to questioning the juridical character of the law of nations. Although it may be true that only very few international lawyers rejected the legal character of the law of nations, the stain spread among domestic lawyers and legal historians. Treaties were considered temporary arrangements only to be respected in so far as it suited the interests of the parties involved. State practice changed with the whims of sovereign princes and governments. In the light of this, it can hardly come as a surprise that legal historians have time and again left the study of State practice and treaties to diplomatic historians.⁸

Neither can it be surprising that most surveys and specialized studies of the history of the modern law of nations of the seventeenth, eighteenth and early nineteenth centuries are more concerned with doctrine than with practice. The traditional views on the modern law of nations are indeed formed on the basis of the study of international legal doctrine, diplomatic history and only some selected areas of State practice.⁹ The

⁵ The American historian Charles H. Haskins first coined the term: *The Renaissance of the Twelfth Century* (Cambridge Mass. and London, 1927).

⁶ Especially Wolfgang Preiser who suggested 1300 as the starting point: 'Über die Ursprünge des modernen Völkerrechts', in E. Bruel (ed.), *Internationalrechtliche und staatsrechtliche Abhandlungen. Festschrift für Walter Schatzel zum 70. Geburtstag* (Düsseldorf, 1960) pp. 373–87; idem, 'Völkerrechtsgeschichte', in Karl Strupp and Hans-Jürgen Schönhauer (eds.), *Wörterbuch des Völkerrechts* (2nd edn., Berlin, 1962) vol. 3, pp. 693–5; idem, 'History of the Law of Nations: Ancient Times to 1648', in Bernhardt, *Encyclopaedia of Public International Law*, vol. 2, pp. 736–7. See also: W. Kienast, 'Die Anfänge des europäischen Staatensystems im späteren Mittelalter', *Historische Zeitschrift*, 153 (1936) pp. 229–71; Wilhelm Janssen, 'Die Anfänge des modernen Völkerrechts und der neuzeitlichen Diplomatie', *Deutsche Vierteljahr Schrift für Literatur und Geistesgeschichte*, 38 (1964) p. 39; F. A. von der Heydte, *Die Geburtsstunde des souveränen Staates* (Regensburg, 1952).

⁷ As such, Preiser's plea for a universal history of international law went largely unheeded. His thesis that at least some ideas and conceptions—such as the just war tradition—go back to classical and even pre-classical antiquity are paid lip service to, but are hardly followed up on: Preiser, 'Über die Ursprünge des modernen Völkerrechts' (above, n. 6) pp. 11–26. Important exceptions are Karl-Heinz Ziegler's (a student of Preiser) attempt at writing a universal history: *Völkerrechtsgeschichte. Ein Studienbuch* (Munich, 1994) as well as Stephan Verosta, 'Geschichte des Völkerrechts', in Alfred Verdross, *Völkerrecht* (5th edn., Vienna, 1964) pp. 31–95; see also David Bederman, *International Law in Antiquity* (Cambridge, 2001). The predominance of the 'Westphalian myth' is as strong in international relations theory as it is in international law. It seems to have caused the discipline similar problems. Barry Buzan and Richard Little speak of the 'confinement to the Westphalian strait-jacket', in *International Systems in World History. Remaking the Study of International Relations* (Oxford, 2000) p. 7.

⁸ Preiser, *Die Völkerrechtsgeschichte. Ihre Aufgaben und Methoden* (Wiesbaden, 1964) p. 11.

⁹ Grewe's *Epochs of International Law*—which though published in 1984 was originally conceived in 1941—is primarily based on State practice. However, it can only cover the 'history of the law of nations' quite fragmentarily. Wilhelm G. Grewe, *The Epochs of International Law* (translated and

appeal by Wolfgang Preiser, four decades ago, for more research into the history of international legal practice is—withstanding an increase in the research over the last two decades—still relevant.¹⁰

The neglect of the history of international law as a scientific discipline has caused even the periodization of European history to be still far from satisfactory. The German scholars Wilhelm Grewe and Wolfgang Preiser have the merit of introducing a workable if debatable scheme that has now been adopted by many international legal historians.¹¹ Grewe and Preiser agreed on the following periodization from the late Middle Ages on: the late Middle Ages (1300–1500), the Spanish Age (1500–1648), the French Age (1648–1815), the English Age (1815–1919), between the World Wars (1919–1945) and the Age of the United Nations (from 1945).¹² Grewe rejected Preiser's thesis that the history of the modern law of nations began with the emergence of the State around 1300. While he accepted that the roots of the modern State go back that far, he argued that the sovereign State as such was not in place before 1500.¹³ In fact, both authors have a point. The modern concept of sovereignty can surely be traced back to the medieval tradition of the learned *ius commune*, while several princes and city-states increasingly affirmed their autonomy vis-à-vis the universal powers of the Latin world—the Pope and the Emperor—from the thirteenth century onwards. Nevertheless, the idea of the Latin West as a political and juridical unity still had some salience in the fifteenth and even early in the sixteenth centuries. Only after the emerging sovereign powers had finally shaken off the bonds of this construction—theoretical though it may have been—could a sovereign State system be considered as formed.

Similarly to other international legal historians and many international lawyers, Grewe and Preiser considered World War I to be a fundamental watershed that marked the end—or at least the beginning of the end—of the 'modern' law of nations.¹⁴ Most scholars accept that a paradigm shift

revised by Michael Byers, Berlin and New York, 2000); first published as *Epochen der Völkerrechtsgeschichte* (Baden Baden, 1984).

¹⁰ Preiser (above, n. 8) pp. 16–17. See also Heinhard Steiger, 'Probleme der Völkerrechtsgeschichte', *Der Staat*, 26 (1987) p. 103.

¹¹ Wilhelm G. Grewe, 'Die Epochen der modernen Völkerrechtsgeschichte', *Zeitschrift für die gesamte Staatswissenschaft*, 103 (1943) pp. 38–66 and pp. 260–94; Wolfgang Preiser, 'Die Epochen der antiken Völkerrechtsgeschichte', *Juristenzeitung*, 23/24 (1956) pp. 737–44; idem, *Völkerrechtsgeschichte*, 1964 (above, n. 8) pp. 34–37; idem, 'Völkerrechtsgeschichte' 1962 (above, n. 6) pp. 680–703; idem, 'Völkerrechtsgeschichte', in Hermann Kunst and others (eds.), *Evangelisches Staatslexikon* (2nd edn., Stuttgart, 1975) cols. 2823–6.

¹² Heinhard Steiger criticized this periodization as it is totally dependent on political criteria and does not take into account events of international law itself: above, n. 10, p. 118.

¹³ Grewe, *Epochs of International Law* (above, n. 9) pp. 11–19.

¹⁴ There is much confusion over the term 'modern' as regards the law of nations. For the purposes of this article, I will use 'modern law of nations' to refer to the period from the fifteenth–sixteenth century to World War I. Grewe ironically enough called it '*klassisches Völkerrecht*', reserving 'modern' for the twentieth century. I will use twentieth century international law to indicate the post World War I era. Some examples of international lawyers who consider World War I a fundamental

took place during the twentieth century. The almost absolute dominance of the sovereign State was greatly reduced through the emergence of international organizations, the rebirth of natural law, the limitation of the right to wage war and the reappearance of the individual as a subject or at least object of international law.¹⁵

In all, Grewe and Preiser's periodization departs from a threefold *summa divisio*: that between pre-modern, modern and twentieth century international law. To that extent it corroborates the dialectical opposition between the modern era and the twentieth century, though Grewe, as an experienced legal historian, was far more careful in his assessment of the paradigm shift than many international lawyers.¹⁶ More recently, both Heinhard Steiger and Martti Koskenniemi have expressed the view that the changes of the twentieth century were foretold by evolutions in the nineteenth century. Steiger has even suggested a different periodization. Neither of them, however, directly challenge the dialectical opposition between a modern system—with its centre of gravity in the eighteenth and early nineteenth century—and the twentieth century system.¹⁷

watershed: Abi-Saab, 'Whither the International Community?' (above, n. 3) pp. 248–265; Cassese, *International Law* (above, n. 3) pp. 30–1; Charles de Visscher, *Théories et réalités en droit international public* (Paris, 1953) p. 69 and pp. 74–80; Wolfgang Friedman, *The Changing Structure of International Law* (London, 1964); Hersch Lauterpacht, 'The Reality of the Law of Nations', in Elihu Lauterpacht (ed.), *International Law Being the Collected Papers of Hersch Lauterpacht* (Cambridge, 1975) vol. 2, pp. 22–5; Malanczuk, *Akehurst's Modern Introduction* (above, n. 3) pp. 23–32; Alistair McNair, *Oppenheim's International Law: a Treatise* (4th edn., London, 1928) vol. 1, pp. 87–99; Hersch Lauterpacht, *Oppenheim's International Law: a Treatise* (5th edn., London, 1937) vol. 1, pp. 99–100; Alfred Verdross, *Völkerrecht* (Berlin, 1937) pp. 11–20; Wilhelm Wengler, *Völkerrecht* (Berlin, Göttingen and Heidelberg, 1964) vol. 1, p. 131. For the main historians of international law: Fritz Dickmann, 'Krieg und Frieden im Völkerrecht der frühen Neuzeit', in idem, *Friedensrecht und Friedenssicherung. Studien zum Friedensproblem in der Geschichte* (Göttingen, 1971) pp. 127–9; Wilhelm G. Grewe, 'Was ist klassisches, was ist modernes Völkerrecht?', in Alexander Böhm, Klaus Lüdersen and Karl-Heinz Ziegler (eds.), *Idee und Realität des Rechts in der Entwicklung internationaler Beziehungen. Festgabe für Wolfgang Preiser* (Baden Baden, 1983) p. 117; idem, 'Über die Gesamtcharakter der jüngsten Epoche der Völkerrechtsgeschichte', in Ingo von Münch (ed.), *Staatsrecht—Völkerrecht—Europarecht. Festschrift für Hans-Jürgen Schlochauer zum 75. Geburtstag* (Berlin and New York, 1981) pp. 301–2; idem, 'History of the Law of Nations: World War I to World War II', in Bernhardt, *Encyclopaedia of Public International Law* (above, n. 2) vol. 2, pp. 839–48; idem, *Epochs of International Law* (above, n. 9) p. 575; Nussbaum, *Concise History of the Law of Nations* (above, n. 3) pp. 238–92; Preiser, *Völkerrechtsgeschichte*, 1964 (above, n. 8) p. 36; Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (4th edn., Berlin, 1997) pp. 200–57; Truyol y Serra, *Histoire du droit international public* (above, n. 3) pp. 133–166; Ziegler, *Völkerrechtsgeschichte* (above, n. 7) pp. 240–244.

¹⁵ Many international relation theorists shared this view. See Hedley Bull, 'Society and Anarchy in International Relations', in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations: Essays in the Theory of International Politics* (London, 1966) p. 36; idem, 'The Grotian Conception of International Society', in Butterfield and Wight, *Diplomatic Investigations*, p. 51; Adam Watson, *The Evolution of International Society. A comparative historical analysis* (London, 1992) pp. 277–87.

¹⁶ Grewe, 'Was ist klassisches, was ist modernes Völkerrecht?' (above, n. 14) pp. 117–120.

¹⁷ Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge, 2001) esp. pp. 19–24. Koskenniemi discerns a tradition of international law based on liberal cosmopolitanism that goes as far back as the 1860s and that dominated international law until 1960. Thus he indicated that one of the most important international lawyers from the

The paradigm shift from 'modern' to twentieth century international law can also be captured in opposing the so-called 'Hobbesian' and 'Grotian' conceptions of international society, the former referring to the sovereign State system in its most extreme form and the latter to a more moderate society of States, which accept the existence of legally binding rules. The recuperation of the thought of the Dutch humanist Hugo Grotius (1583–1645), as a precursor to an international society in which the licence of the sovereign State is limited through law, reaches back as far as Cornelis van Vollenhoven's *The Three Stages in the Evolution of the Law of Nations*, first published in 1918.¹⁸ Van Vollenhoven expressed the hope that the atrocities of World War I would lead to an era in which the law of nations would finally live up to the ideas set out three hundred years before by Grotius. This assimilation of Grotian thought to contemporary evolutions was adopted by international lawyers like Maurice Bourquin and Hersch Lauterpacht.¹⁹ Through Lauterpacht, the 'Grotian tradition' became a *locus classicus* among Anglo-American international lawyers. The British international relations theorist Hedley Bull opposed a 'Grotian' to a 'Hobbesian' and a 'Kantian' conception of international society.²⁰ Though neither Lauterpacht nor Bull were much concerned with the historical development since Grotius, and they themselves never called the modern era unambiguously Hobbesian, the opposing conceptions have frequently been used to illustrate the paradigm shift of the twentieth century. The twentieth century is generally considered to be

twentieth century, Hersch Lauterpacht (1897–1960), was deeply rooted in the nineteenth-century political and legal culture, which he called the Victorian tradition, pp. 353–412. Steiger was most of all concerned with the process of universalization of international law: Heinhard Steiger, 'Vom Völkerrecht der Christenheit zum Weltbürgerrecht. Überlegungen zur Epochenbildung in der Völkerrechtsgeschichte', in Paul-Joachim Heinig, Sigrid Jahns, Hans-Joachim Schmidt, Rainer C. Schwinges and Sabine Wefers (eds.), *Reich, Regionen und Europa im Mittelalter und Neuzeit. Festschrift für Peter Moraw* (Berlin, 2000) pp. 171–87; translated as 'From the International Law of Christianity to the International Law of the World Citizen', *Journal of the History of International Law*, 3 (2001) pp. 180–93. Steiger's periodization comes close to the one Hedley Bull and other international relations theorists used. Bull distinguishes a Christian period from a European one. The Christian era (until the seventeenth century) is the formative period of the modern law of nations, the European era (eighteenth–nineteenth centuries) its heyday. Hedley Bull, *The Anarchical Society: a Study of Order in World Politics* (2nd edn., London, 1995) pp. 26–36.

¹⁸ Cornelis van Vollenhoven, *De drie treden van het volkenrecht* (The Hague, 1918). English translation: The Hague, 1919.

¹⁹ Maurice Bourquin, 'Grotius et les tendances actuelles du droit international', *Journal de droit international et de législation comparée*, 7 (1926) pp. 85–125; Hersch Lauterpacht, 'The Grotian Tradition in International Law', *this Year Book*, 23 (1946) pp. 1–53.

²⁰ Bull, 'The Grotian Conception' (above, n. 15); idem, *Anarchical Society* (above, n. 17) pp. 23–8; idem, 'The Importance of Grotius in the Study of International Relations', in Bull, Kinsbury and Roberts, *Grotius and International Relations* (above, n. 2) pp. 65–93; Benedict Kinsbury and Adam Roberts, 'Grotian Thought in International Relations', in Bull, Kinsbury and Roberts, *Grotius and International Relations* (above, n. 2) pp. 1–64; Martin Wight, 'Western Values in International Relations', in Butterfield and Wight, *Diplomatic Investigations* (above, n. 15) p. 89–131; idem, *International Theory: the Three Traditions* (2nd edn., London, 1996). See also: Edward Keene, 'The Reception of Hugo Grotius in International Relations Theory', *Grotiana*, new series 20–21 (1999–2000) pp. 137–9.

'Grotian'. In the context of a historic perspective determined by the paradigm shift, the condemnation of the modern era as Hobbesian easily follows as an afterthought.

In essence, both Lauterpacht and Bull associated the following features with the 'Grotian tradition'. First, some rights and obligations were directly attributed to the individual in the international legal order. A strict dualism was rejected. Second, the members of the international society had to accept that their freedom of action was restricted by legally binding rules. The ultimate source of these rules had to transcend their own will. Third, the members of the international society were held commonly responsible for upholding and enforcing these rules. This was attached to Grotius's concept of man's natural sociability and solidarity. The right to wage war was restricted through the distinction between just and unjust wars.

This article aims at contributing to the debate about the paradigm shift of the twentieth century, not by adding yet another assessment of the twentieth century, but rather by looking at the other side of the coin: the law of nations from the early modern period (fifteenth–eighteenth centuries). This paper draws on substantial research into early modern treaty practice.²¹ As such, it is a reappraisal of a historiography that is still too one-sidedly inspired by the study of early modern doctrine. Until recently, the historiography on the early modern law of nations from the sixteenth to eighteenth centuries has been determined, if not suffocated, by the positivistic views of some nineteenth- and early twentieth-century international lawyers on their own times and by that era's consecration of the sovereign State. The early modern period was looked upon and assessed by reference to the need to justify nineteenth-century positivism and later to put twentieth-century ideas on the paradigm shift in a broader perspective. It was hardly considered in its own right. Recently, some international legal historians have come to reassess early modern doctrine. They have challenged the traditional classification of some eighteenth-century international lawyers, such as Cornelius van

²¹ See: Randall Lesaffer, 'The Westphalian Peace Treaties' (above, n. 3); idem, *Europa: een zoektocht naar vrede (1453–1763/1945–1997). Het moderne, Europese statensysteem in vredes- en alliantieverdragen* (Leuven, 1999); idem, 'La paix de Vervins (2 mai 1598): souveraineté, territorialité et développement du droit public européen', in Jean-Marie Cauchies and Serge Dauchy (eds.), *Personnalité, territorialité et droit* (Brussels, 1999) pp. 131–52; idem, 'The Concepts of War and Peace in the 15th Century Treaties of Arras', in Denis Clauzel, Charles Giry-Deloison and Christophe Leduc (eds.), *Arras et la diplomatie européenne XV–XVIe siècles* (Arras, 1999) pp. 165–82; idem, 'The Medieval Canon Law of Contract and Early Modern Treaty Law', *Journal of the History of International Law*, 2 (2000) pp. 178–98; idem, 'Petrus Gudelinus' *De Jure Pacis* commentaries: een vroege bijdrage tot de volkenrechtsleer?', *Pro Memoria. Bijdragen tot de Rechtsgeschiedenis der Nederlanden*, 3 (2001) pp. 67–96; idem, 'War, Peace, Interstate Friendship and the Emergence of the *ius publicum Europaeum*', in Asch, Voss and Wrede, *Frieden und Krieg* (above, n. 2) pp. 87–113; idem, 'Amicitia in Renaissance Peace and Alliance Treaties (1450–1530)', *Journal of the History of International Law*, 4 (2002) pp. 77–99. To a large extent I draw on the sources and examples quoted there. For more examples from treaty practice and more references to secondary literature on early modern treaty practice and doctrine than included in this article, I refer to these publications.

Bynkershoek (1673–1743) and Emer de Vattel (1714–1767), as positivists.²² This article argues that the same reassessment can be made from the perspective of treaty practice and offers an attempt at rewriting the history of the early modern law of nations. In doing so, it to some extent qualifies, or at least nuances, the traditional view about the paradigm shift of the twentieth century and the ‘victory’ of the Grotian tradition over the Hobbesian one. This article does not discuss the nineteenth century, and consequently does not enter into the question when the period of the modern law of nations can be considered to have ended. The article only aims at reassessing the early modern law of nations, adding some broad conclusions on the depth of the paradigm shift and on the Grotian tradition today.

II. THE LAW OF NATIONS IN THE SPANISH AGE (CA. 1450–1648)

(a) *The Collapse of the Medieval International Society*

In the views of Grewe and Preiser, the Spanish Age of international law started around 1500 with the emergence of Spain as a leading power in Europe. Many diplomatic historians suggested the year 1494 as the dawn of a new era. In that year, the French king, Charles VIII (1483–1498) invaded Italy pursuing the claims of his house to the throne of the Southern kingdom of Naples. His successor, Louis XII (1498–1515) added the claims of his Visconti and Orléans ancestors to the duchy of Milan. This brought French royalty into a collision course with the king of Aragon, Ferdinand (1474–1516), who as king of Sicily also held claims over Naples. Between 1494 and 1530 the Spanish and French kings fought over the hegemony in Italy. It was only the first phase of a conflict between the Spanish Habsburgs and the French Valois for ascendancy in Europe, which was to continue for almost two centuries.²³ Ironical as it may seem, this struggle is seen as the main factor in the transformation of Europe into a system in the definition of Hedley Bull: a system in which the members ‘have sufficient [read ‘structural’] contact between them and sufficient impact on another’s decisions to cause them to behave as parts of a whole’.²⁴ The Habsburg-Valois competition acted as a kind of integrating factor. Through scores of alliances and conflicting interests, all geopolitical changes became part of the struggle between the two leading powers. This may seem somewhat overrated and too reminiscent of the Cold War era,

²² Kinji Akashi, *Cornelius van Bynkershoek. His Role in the History of International Law, International Law in Japanese Perspective* (The Hague, London and Boston, 1998) vol. 4; Emmanuelle Jouannet, *Emer de Vattel et l’émergence doctrinale du droit international classique*, Publication de la Revue Générale de Droit International Public 50 (Paris, 1998).

²³ Eduard Fütter, ‘Geschichte des europäischen Staatensystems von 1492–1559’, in *Handbuch der mittelalterlichen Geschichte* (1919) p. 4; Wolfgang Windelband, *Die Auswärtige Politik der Grossmächte in der Neuzeit von 1494 bis zur Gegenwart* (Essen, 1936) p. 25.

²⁴ Bull, *Anarchical Society* (above, n. 17) p. 9.

but it is true that diplomatic relations became more permanent; more structured and widespread from then on—at least until the great disruption of the West caused some decades later by the Reformation.

However, there is much to be said for also taking the treaty practice of the second half of the fifteenth century into account. First, the later fifteenth century was marked by the gradual ascension of major dynastic powers such as the Valois and the Habsburgs, which was to dominate the Spanish Age. Second, the fifteenth and early sixteenth centuries saw the outcry for a new crusade against Islam, this time against the Ottoman Turks. The revival of the crusaders' ideal was a direct consequence of the spectacular expansion of the Turks in Europe and the Mediterranean after the conquest of Constantinople in 1453.²⁵ Third, during the second half of the fifteenth century, the leading powers of Italy—the Pope, Venice, Naples, Milan and Florence—through various alliance treaties constituted a kind of State system that in many respects prefigured the larger European one.²⁶ The conquest of Constantinople by the Turks and their annexation of Serbia had put Italy in the frontline of the external war of Christianity and had revived its importance as a basis for launching an offensive to the East. As such, the old *regnum Italiae* had regained its status as the 'garden of the Empire' as Dante Alighieri (1265–1321) had called it. Since leading the outward defence of Christianity was the first privilege and duty of the secular leader of the Latin West, the hegemony over Italy once again became the precondition to hegemony in Europe.²⁷ This makes it all the more relevant to take into account the later fifteenth-century treaties between the major Italian powers.

This somewhat broader perspective on the 'Spanish Age' allows us to see better that the treaty practice of the sixteenth century is marked by a caesura around 1530–1540. The decades prior to 1530 were not completely overshadowed by the emergence of sovereign, dynastic powers like Spain, France or England. Assessing the Renaissance (1450–1530) as a formative period for the sovereign State can only be done with the benefit of hindsight. Such an assessment does not capture the dynamics of the period. In truth, the Renaissance saw the final clash between the emerging sovereign princes and the old medieval ideal of the Latin West. The emergence of the sovereign powers did not take place in a vacuum but was a process that took shape in dialogue with the old conceptions.

²⁵ Norman Housley, *The Later Crusades from Lyons to Alcazar 1274–1580* (Oxford, 1992) pp. 80–150.

²⁶ Nicolai Rubinstein, 'Das politische System Italiens in der zweiten Hälfte des 15. Jahrhunderts', *Zeitschrift für Historische Forschung*, Beihefte 5 (1988) pp. 105–119.

²⁷ This idea of Italy as the garden of empire was central in the thought of Mercurino de Gattinara (1465–1530), Charles V's imperial chancellor and supporter of the idea of empire in his government. On Gattinara's thought see John M. Headley, 'Germany, the Empire and *Monarchia* in the Thought and Policy of Gattinara' in Heinrich Lutz (ed.), *Das römisch-deutsche Reich im politischen Systems Karls V.* (Munich, 1982) pp. 15–31; idem, *The Emperor and his Chancellor. A Study of the Imperial Chancellery under Gattinara* (Cambridge, 1983).

The final victory of the new in this face-off between the old and the new was no foregone conclusion at the time.

Medieval and Renaissance Europe defined itself as a religious, cultural and to a certain extent political and juridical unity, often referred to as the *respublica christiana*.²⁸ Whereas the Latin world consisted of many, more or less autonomous, political entities, ranging from large dynastic monarchies down to small fiefs and free cities, they were all part of a greater hierarchical and juridical *continuum*. On a juridical level, this unity materialized in two different ways during the late Middle Ages. First, there was the idea that the *respublica christiana* was under the supreme leadership of the Pope and the Emperor. In so far as the Emperor was concerned, since the days of Charlemagne and his direct successor, this was no more than an ideal, part of the juridical, political and propagandistic discourse. From the early fourteenth century onwards, papal authority had been severely jeopardized as well. Nevertheless, the ideal of the supremacy of the Pope, and to a much lesser extent of the Emperor, retained some value in the diplomatic and juridical discourse. Second, and much more importantly, the learned *ius commune*—Roman and canon law—and the general rules of feudal law provided a framework of juridical concepts and political ideals, common to the whole of the Latin West on which the legal organization of international relations could be built. Thus the *ius gentium* of the late Middle Ages was to be found in the *ius commune* and feudal law.²⁹

The fall of Constantinople in 1453, followed by the spectacular expansion of the Ottoman Empire in the Eastern Mediterranean and the Balkans (1453–1529), which brought the Ottomans to the gates of Vienna in 1529, led to a temporary revival of the medieval ideal of Europe as an integrated whole. This was expressed in the first place by the revival of the crusaders' ideal. The advance of the Turks brought some of the heartlands of the Latin West, Italy and Southern Germany, into the frontlines of the war against the infidels. As a precondition to any common effort against the Turks, the ideal of peace among the Christian princes was inseparable from that of a crusade. Numerous peace and alliance treaties put forward peace within the Latin world as the first objective of all Christian monarchs—and thus of the *respublica christiana*. As Europe's spiritual leader, the Pope took the lead in this struggle. Treaty practice expressed this in various manners. The numerous anti-Turkish or so-called Holy Alliances of the late fifteenth and of the sixteenth centuries generally

²⁸ The term '*respublica christiana*' was already used during the late Middle Ages, but became more common from the Renaissance on. Even after the collapse of the medieval system as described here, the term lived on for another two centuries. Nevertheless, it is rather common to refer to the medieval legal order of Europe as that of the *respublica christiana*. Richard Tuck, *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant* (Oxford, 1999) pp. 28–9. See on the idea of the unity and empire in the Late Middle Ages: Andreas Osiander, 'Before Sovereignty: Society and Politics in *ancien régime* Europe', *Review of International Studies*, 27 (2001) pp. 119–145.

²⁹ Grewe, *Epochs of International Law* (above, n. 9) pp. 37–74; Ziegler, *Völkerrechtsgeschichte* (above, n. 7) p. 97, pp. 107–111, pp. 120–7 and pp. 133–7.

offered a leading role to the Pope. On several occasions, Popes proclaimed unilaterally a peace or truce between the Italian or even between all European powers.³⁰ That the European powers decided afterwards upon a mutual agreement before the peace became effective does not alter the fact that to a certain extent they recognized the papal right of initiative.³¹

The special role played by the Pope within the *respublica christiana* was not limited to the crusade. Most treaties were ratified with an oath taken by the monarchs or rulers, generally sworn on the Bible, the Cross or the canon of the Mass. Perjury was a sin and an offence sanctioned by canon law and came under the jurisdiction of the ecclesiastical tribunals. As a result the ecclesiastical authorities—the Pope as the universal authority within the Church foremost among them—were the custodians of the legal order between the sovereign princes.³² This position was also expressed by the fact that until the end of the seventeenth century the Pope was often invited to arbitrate between sovereign rulers. More generally, as treaties were in the first place contracts between princes, not between abstract bodies, treaties were to be considered to fall under the general rules of the private law of contracts.³³ Treaty law as an autonomous body of law only emerged from the seventeenth century onwards. Before that time, the law ruling contracts between princes was for the largest part deduced from the learned Roman law, feudal law and especially canon law.³⁴

³⁰ Like the *Pax Paulina* of 1468, in Jean Dumont, *Corps universel diplomatique du droit des gens* (Amsterdam and the Hague, 1726) vol. 3-1, pp. 360-72 (hereinafter Dumont) and the papal bull of 6 March 1517 ordering a universal truce between all Christian powers for five years: Eugène Charrière (ed.), *Négociations de la France dans le Levant ou Correspondance, Mémoires et Actes diplomatiques*, Collection des sources inédites sur l'histoire de France (Paris, 1840) vol. 1, pp. 63-8.

³¹ Peace of London of 2 October 1518 between the French and English kings, adhered to and ratified by Charles V (1519-1558) on 19 January 1519, in M. Mariño (ed.), *Tratados internacionales de España. Carlos V* (Madrid, 1982) vol. 3-1, pp. 217-35 (hereinafter Mariño).

³² M. David, 'Parjure et mensonge dans le Décret de Gratien', *Studia Gratiana*, 3 (1955) pp. 117-141; Jocelynne G. Dickinson, *The Congress of Arras. A Study in Medieval Diplomacy* (Oxford, 1955) pp. 71, 76, 206-7; Jean Gaudemet, 'Le serment dans le droit canonique médiéval', in Raymond Verdier (ed.), *Le serment* (Paris, 1991) vol. 2, pp. 68-9; Allen Z. Hertz, 'Medieval Treaty Obligation', *Connecticut Journal of International Law*, 6 (1991) p. 431; Lesaffer, 'The Medieval Canon Law of Contract' (above, n. 21) pp. 191-6; Klaus Neitmann, *Die Staatsverträge des deutschen Ordens in Preussen 1230-1449. Studien zur Diplomatie eines spätmittelalterlichen deutschen Territorialstaates* (Cologne and Vienna, 1986) pp. 303-4; Arthur Nussbaum, 'Forms and Observance of Treaties in the Middle Ages and the Early Sixteenth Century', in A. Lipsky (ed.), *Law and Politics in the World Community. Essays on Hans Kelsen's Pure Theory and Other Related Problems in International Law* (Berkeley, 1953) pp. 191-8; Heinhard Steiger, 'Bemerkungen zur Friedensvertrag von Crépy-en-Laonnais vom 18. September 1544 zwischen Karl V. und Franz I.', in Ulrich Beyerlin, Michael Bothe, Rainer Hofmann and Ernst-Ulrich Petersman (eds.), *Recht zwischen Umbruch und Bewahrung. Völkerrecht—Europarecht—Staatsrecht. Festschrift für Rudolf Bernhardt* (Berlin, 1995) pp. 256-60.

³³ Grewe, *Epochs of International Law* (above, n. 9) p. 196.

³⁴ Johannes Bärmann, 'Pacta sunt servanda. Considérations sur l'histoire du contract consensuel', *Revue internationale du droit comparé*, 13 (1961) pp. 35-6; James Gordley, 'Natural Law Origins of the Common Law of Contract', in John Barton (ed.), *Towards a General Law of Contract* (Berlin, 1990) pp. 367-465; idem, *The Philosophical Origins of Modern Contract Law* (Oxford, 1991); idem, 'Good Faith in Contract Law in the Medieval *Ius Commune*', in Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law* (Cambridge Studies in International and Comparative Law, Cambridge, 2000) pp. 93-117; Lesaffer, 'The Medieval Canon Law of Contract'

The revival of the medieval concept of the international society also applied to the imperial authority. Though it was never the primary goal of their policies, the mightiest rulers in Europe, first the king of France and after 1519 the Emperor, Charles V (1519–1558), at a certain point revived the medieval ideal of *monarchia universalis*, the secular leadership in the West.³⁵ The Spanish-French struggle for hegemony in Italy should partly be seen in that context. The efforts of making their leadership accepted by other monarchs found an expression in the claim to be recognized as leader of the Christian world for the battle against the infidels. Charles V could only force his main opponents to recognize him as the secular leader of Christianity exceptionally, when his ascendancy on the battlefield was at its greatest, as in the Madrid Treaty of 1526 with the captive French king Francis I (1515–1547) and in the Barcelona Treaty of 1529 with the Pope, after the sack of Rome of 1527.³⁶

In the end, the strategic co-operation between France and the Ottoman Empire, later between France and the German Protestant princes, prevented Charles V from attaining *monarchia* in Europe. From the years 1530–1540 onwards, the supremacy of Charles V declined. The division of his empire at the time of his abdication in 1555/1556 implied the resignation of the pursuit of universal monarchy. The Spanish kingdom under Philip II (1555–1598) and his successors Philip III (1598–1621) and Philip IV (1621–1665) remained the major power in Europe until the middle of the seventeenth century, but the Spanish kings now saw themselves as leaders of the Catholic world against the Northern reformed powers and against the Turks. The Reformation put an end to the religious unity of Europe and knocked the universal claims of the Pope off the foundations on which they rested. The religious division also became a factor in the policy of the Empire and in international policy.

The treaty practice of the fourth and fifth decades of the sixteenth century shows a quite sudden turnabout: it was the collapse of the old system of the *respublica christiana*. Its revival had proved to be its last convulsion. While, despite the religious divisions, the Latin West went on to consider itself a cultural unity and the name *respublica christiana* lived on in treaties until the eighteenth century, the old, late-medieval legal order did not function any more. The old supranational powers lost the last remnants of their universal authority and, worse, the common

(above, n. 21) pp. 185–91; Reinhard Zimmermann, *The Law of Obligations. Roman Foundations of the Civil Tradition* (Oxford, 1996) p. 542.

³⁵ On *monarchia universalis* in the early modern era: Franz Bosbach, *Monarchia Universalis. Ein politische Leitbegriff der frühen Neuzeit* (Göttingen, 1986); James Muldoon, *Empire and Order. The Concept of Empire, 800–1800* (London, 1999); Frances Yates, *Astraea: the Imperial Theme in the Sixteenth Century* (London, 1975). See also Randall Lesaffer, Charles V, *Monarchia Universalis* and the Law of Nations (1515–1530), *Tijdschrift voor Rechtsgeschiedenis*, 71 (2003—forthcoming).

³⁶ Treaty of Madrid of 14 January 1526, Arts. 23 and 25, in Mariño (above, n. 31) (Madrid, 1986) vol. 3-3, pp. 148–53; Treaty of Barcelona of 29 June 1529, Preamble and Arts. 2 and 7, in Dumont (above, n. 30) vol. 4-2, pp. 2–4.

basis underlying the old *ius gentium*—canon law—was suddenly rejected by half of Europe. The number of holy alliances diminished dramatically. Within the remaining anti-Turkish alliances, such as the League of Lepanto of 1571, the Pope henceforth played his role on a more equal if not similar basis with the secular powers.³⁷ As a result, his political leadership lost all real significance. Although until the end of the seventeenth century most treaties were still confirmed by oath, after 1540 this oath rapidly lost its canonical significance, even in treaties between Catholic powers. The taking of the oath was still accompanied by religious formalities but the canonical jurisdiction was no longer recognized or referred to. While this may seem natural for treaties between Catholic and Protestant powers, it was also true for treaties involving only Catholic powers.³⁸ The canon law and the ecclesiastical authorities had played out their part as common law and institutions of the *respublica christiana*.

The total disappearance of any reference to imperial or papal authority by the 1540s reveals that by that date the external sovereignty of the sovereign princes and powers of Europe was accomplished. External sovereignty or *supremitas* as a concept went back to at least the twelfth century. But beforehand, it had always been considered a relative concept. During the late Middle Ages, many princes and city-states considered themselves to be *superiorem non recognoscens*. But this only implied the rejection of the secular leadership and hegemony of the Emperor. As Pope Innocent III (1198–1216) had expressed it in his bull *Per Venerabilem* of 1202, the king of France was *imperator in regno suo*—Emperor within his own realm.³⁹ This did not imply the rejection of the spiritual authority of the Pope, which as was shown above spread to matters such as the interpretation and application of treaties. Moreover, neither did the affirmation of secular sovereignty in the sense of the rejection of any superior, secular authority imply the rejection of the supreme authority of the *ius commune* as the applicable law of the international society the princes were part of. But now external sovereignty became truly absolute. The universal authority of the Pope was rejected, so that there was no central authority left. More to the point, the actual basis of the binding character of the general law of Christianity was jeopardized.

(b) *The Emergence of Sovereign Powers in the Spanish Age*

Halfway through the sixteenth century, the traditional universal powers, the Pope and the Emperor, had lost the struggle for the establishment of their supremacy in Europe. The external sovereignty of the European powers was therefore acquired, as there was no longer a higher, external authority.

³⁷ Though he was not called the head of the alliance any more, his particular spiritual powers were still invoked: league of 26 May 1571, Arts. 7–8, in Dumont (above, n. 30) vol. 5-1, p. 204.

³⁸ Lesaffer, 'The Medieval Canon Law of Contract' (above, n. 21) pp. 195–6; Steiger, 'Bemerkungen zur Friedensvertrag von Crépy-en-Laonnais' (above, n. 32) pp. 256–60.

³⁹ Quentin Skinner, *The Foundations of Modern Political Thought* (Cambridge, 1978) vol. 1, pp. 9–12.

This also appeared in the way the right to wage war was reflected in the treaties of the Spanish Age. As a matter of fact, external sovereignty had already been achieved much earlier on this point. The treaties of the Spanish Age paid lip service to the medieval doctrine of the *bellum iustum*, the just war.⁴⁰ Alliance treaties always justified each and every war, however offensive it might in fact be, as a lawful reaction to earlier aggressions or to an infringement of certain rights by the opposite party. A juridical pretext was easily found. As, certainly after 1540, there was no longer an effective supranational authority strong enough to pass judgment on the justification of the claims put forward by the belligerents or to impose the law, the just war doctrine had become an empty box. Only moral or political considerations could exercise a restraining influence on the sovereigns now.

The lack of real substance in the doctrine of the *bellum iustum* was matched by the total absence of the concept of just peace in treaty practice. To the doctrine of the just war corresponded in principle discriminatory concepts of war and peace. The former implies that the lawful party enjoys the benefit of the laws of war, whereas the other party does not. The latter signifies that the unlawful party should be punished after the war was over. The alliance and peace treaties of the Spanish Age showed that the *ius in bello* was applied without any discrimination between the parties. References to the responsibility for the war or to post-war sanctions to be imposed on the guilty belligerent were absent from the peace treaties.⁴¹ In only a handful of treaties, which were by and large treaties between sovereigns and their rebellious subjects, the responsibility for the war was attributed to one of the belligerents.⁴²

From the 1540s onwards, treaties showed a gradual strengthening of internal sovereignty as well. In my definition, internal sovereignty implies that the central ruler is the sole power within his territories who enjoys an original legitimization of power and that all other territorial and functional public authorities—such as the nobility, clergy and towns—derive their powers from the central ruler. Furthermore, in so far as it reflects upon international relations and law, internal sovereignty means that only the sovereign is a subject of international law and that he enjoys a monopoly of acting on the international scene. It is a precondition to dualism in international law and is coterminous with the emergence of an abstract concept of State.⁴³

⁴⁰ See on the medieval doctrine: Haggenmacher, *Grotius et la doctrine de la guerre juste* (above, n. 2); Maurice H. Keen, *The Laws of War in the Late Middle Ages* (London, 1965) pp. 63–81; Frederick Russell, *The Just War in the Middle Ages* (Cambridge, 1975).

⁴¹ See Lesaffer, *Europa: een zoektocht naar vrede* (above, n. 21); Jörg Fisch, *Krieg und Frieden im Friedensvertrag. Eine universalgeschichtliche Studie über die Grundlagen und Formelemente des Friedensschlusses* (Stuttgart, 1979) pp. 92–102.

⁴² e.g. the peace of Sablé of 20 August 1488 between the king of France and the duke of Brittany, in Dumont (above, n. 30) vol. 3-2, pp. 209–10.

⁴³ For Bull's similar definition of internal sovereignty: *Anarchical Society* (above, n. 17) p. 8.

Until the middle of the sixteenth century, numerous non-sovereign rulers, such as the mightiest of the French vassals, participated directly in international relations. They concluded alliance and peace treaties with their own sovereign or with foreign powers. These treaties generally did not offer any express justification for this behaviour. From this we can deduce that the right of non-sovereign powers to make treaties was considered evident. After 1540 the number of treaties involving non-sovereign powers diminished. From then on, they appeared only within the context of uprisings or civil wars. Increasingly, the sovereign monarchs tried to present peace agreements concluding such conflicts as royal edicts, thus avoiding a direct involvement of their subjects as equal partners in a reciprocal treaty.⁴⁴

From a formal point of view, treaties were indeed considered to be private contracts. The text of the treaties mentioned the rulers as parties to the treaty.⁴⁵ The signatory princes acceded to the treaties in their own names and not as representatives of a public entity or political body. The involvement of their subjects was only indirectly assured through the promise or commitment of the signatory prince that he would use his princely authority to make his vassals and subjects observe the treaty.

The personal character of the treaties was exemplified through a process that can be called co-ratification. In many important peace and alliance agreements from the late Middle Ages to the early sixteenth century, it was stipulated that the signatory princes would have some of their most important nobles and towns ratify the treaty. Thereby, these internal powers not only became guarantors to the treaty, having to support the victim of a breach of treaty, but also became bound to the treaties in a more direct way and in their own names.⁴⁶ These clauses confirm the personal character of treaties. The personal obligation of the prince and the indirect involvement of his subjects through him were not always considered to be sufficient. Co-ratification also indicated the recognition by the princes that their vassals and towns were subjects of law in the international field and could—to a certain extent—act autonomously. After 1540, co-ratification disappeared almost completely.⁴⁷ This adds proof to the reinforcement of the internal sovereignty.

⁴⁴ e.g. the several 'edicts' or peaces during the French wars of religion (1562–1598): edict of 17 January 1562, Preamble, in Dumont (above, n. 30) vol. 5-1, p. 90; edict of 30 September 1577, Preamble, in Dumont vol. 5-1, pp. 302–3; edict of Nantes of 2 May 1598, Preamble, in Dumont, vol. 5-1, pp. 545–6.

⁴⁵ Grewe, *Epochs of International Law* (above, n. 9) p. 196.

⁴⁶ Klaus Neitmann does not agree with this. According to him, the co-ratifying powers did not accede to the treaty as they only offered an extra guarantee to it. He underestimates the personal character of the treaty as 'private contract' between the princes. Nevertheless, the involvement of the co-ratifying powers proves that this personal character became problematic from the late Middle Ages onwards. From a modern perspective, the co-ratification indicates the lack of internal sovereignty and of an abstract concept of State; from the perspective of the late Middle Ages it was the first step towards it. Neitmann, *Staatsverträge* (above, n. 32) pp. 276–81.

⁴⁷ This was however not the case for the Holy Roman Empire, but that was due to the specific constitutional evolution there: Steiger, 'Der Westfälische Frieden' (above, n. 3) pp. 40–4.

Another problem related to the personal character of treaties was the question if and how treaties bound the successors of the princes who had first entered them. There was no undisputed, general rule that stated that successors were automatically bound by the treaty. Such a rule was only to be put forward and adopted by doctrine around 1600.⁴⁸ Just like some contracts in private law, treaties between princes were agreements *intuitu personae*. A consequent application of contract law leads to the conclusion that the successors were not bound. The treaty expired with the death of one of the signatory princes.

Most of the treaties of the Spanish Age expressly stated that the signatory parties entered the treaties for themselves and their successors. These clauses allow us to conclude that on the one hand the binding of successors was not self-evident, and that, on the other hand, the princes could commit their successors if they chose. Some treaties contained more specific clauses. First, several treaties demanded that the heir to the throne would co-ratify the treaty. Normally, this was restricted to treaties involving the cession of territories or rights. By this ratification, the heir accepted the reduction of his inheritance.⁴⁹ Thus, these clauses do not force us to re-evaluate. Second, some treaties provided that the treaty would remain valid for a certain period after the death of one or both of the signatory princes. During that period—more often than not one year—the new ruler could ratify the treaty, or choose not to do so. This stipulation seems to contradict the presumption that princes could bind their successors. However, after 1540 these clauses disappeared. After that date, it seemed at least to be no longer disputed that a prince could bind himself, his successors and his and their subjects perpetually. In this, another example of the very gradual emergence of internal sovereignty and the depersonalization of treaty law can be read. Even in the seventeenth and eighteenth centuries, the main articles of peace and alliance treaties still mentioned the heirs and successors as one of the categories that would benefit from the treaty. Though by then these references had become standardized formulae, they indicated that the binding character was, although widely accepted, still not self-evident.

In all, these evolutions in treaty practice show a caesura around 1540. It seems that the accomplishment of external sovereignty also did something to stimulate internal sovereignty. Nevertheless, this process would

⁴⁸ Balthasar de Ayala, *De Jure et Officiis Bellicis et Disciplina Militari Libri Tres* 1,7,10, Classics of International Law (Oxford, 1912) vol. 2-1, pp. 83-4; Petrus Gudelinus, *De Jure Pacis Commentarius* 12, 2-3 (*Opera Omnia*) (Antwerp, 1684) pp. 563-4 (written between 1609-1620); Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, 2, 16, 16-18 (Robert Feenstra, ed.) (Aalen, 1993) pp. 416-418.

⁴⁹ One of the most famous examples is the Treaty of Madrid, whereby Francis I (1515-1547) had to agree to the cession of the duchy of Burgundy to Charles V: Art. 44, in Mariño (above, n. 31) vol. 3-3, p. 170.

take more than a century before internal sovereignty was truly achieved in most European countries.

(c) *The Crisis of the European Legal Order (ca. 1540–1648)*

After 1540 the European legal system was precipitated into a profound crisis. As the last remnants of the universal, juridical authority of the Pope and the Emperor were lost and the universal authority of the *ius commune* was jeopardized, the sovereign powers were thrown back upon their own resources for the creation and enforcement of rules of law. The canon law, no doubt the most important inspiration for the medieval *ius gentium*, lost its significance as a basis for legal unity in Europe. Thereby, the whole *ius gentium* of old, which was part of the tradition of the *ius commune* and which was an inextricable amalgam of canon, Roman and feudal precepts and rules, lost its binding, though not its intellectual, authority. The confrontation with peoples, previously unknown to Christians, in the New World added another challenge to the international legal order. For the relations with those non-Christian, non-Roman peoples the *ius gentium* of old had no relevance. All of a sudden, the 'basis of obligation' was taken from under the 'universal'—that is, European—law of nations. In time, customary law would form the main basis for a new general law of nations. But for now, custom and State practice, since the generally accepted juridical framework had lost its authority, had to reassert itself.

Apart from customary law, the European powers had to turn mainly to treaties for the creation of new rules. However, treaties were not indicated as suitable instruments for the creation of a universally applied law of nations. The overwhelming majority of treaties were bilateral agreements. Even when multilateral peace conferences were held, as was the case at Cambrai in 1529 and at Câteau-Cambrésis in 1559, but also in Westphalia in 1648, at Nijmegen in 1678–1679, at Rijswijk in 1697 and at Utrecht in 1713, they ended with a series of bilateral treaties.⁵⁰ In the absence of a strong, common legal system after the disappearance of the consensus around the canon law, different traditions and families of treaties and treaty law came to the fore, varying according to the treaty partners involved.⁵¹ It was the age of particular international law.

The Preambles and the main Articles of treaties demonstrated, however, that the European powers still considered themselves to be part of a larger entity, which was still called the *respublica christiana*, and the pursuance of peace within that entity remained the ultimate objective. Even more than in the treaties before 1540, it appeared that the European sovereigns accepted

⁵⁰ Krystyna Marek, 'Contribution à l'étude de l'histoire du traité multilatéral', in Emanuel Diez, Jean Monnier, Jörg P. Müller, Heinrich Reimann and Luzius Wildhaber (eds.), *Festschrift für Rudolf Bindschedler zum 65. Geburtstag* (Bern, 1980) pp. 17–39.

⁵¹ Fisch, *Krieg und Frieden* (above, n. 41) pp. 536–7.

and realized that they were not only responsible for the welfare of their own States, but for the entire international society. In the Preambles and the ratification documents to the main peace treaties of the sixteenth and early seventeenth centuries, peace was often said to be made, not only for the benefit of the princes involved, but also of the whole of Christianity.

The disappearance of the legal basis for the *respublica christiana* was perceived as a crisis. This appeared clearly in the continuous references to the concept of *amicitia* in peace and alliance treaties. These references increased significantly from the beginning of the sixteenth century onwards. As a concept of the law of nations, *amicitia* means the acceptance of the existence of a legal order and peaceful relations between powers independent of each other. It comes down to the exclusion of force in mutual relations and stands as a legal qualification for peace.

In early modern treaty practice, *amicitia* first implied that the princes involved in the treaty would not seek to cause damage to the interests or rights of the partner or of his subjects, allies and adherents. It also implied that they would not allow their own subjects, allies and adherents to do so. Second, *amicitia* encompassed a promise not to discriminate against one another's subjects before the law. This was of the utmost importance in the context of trade.⁵² Historically, *amicitia* was the precondition for the development of peaceful relations and legal order between independent political entities. The frequent confirmation of *amicitia* indicates the prevailing uncertainty regarding the existence of a mutual legal relation and a functional international society.

References to *amicitia* appeared foremost in the Preambles and principal Articles of both peace and alliance treaties. By these texts and Articles, the friendship between the treaty partners was affirmed or restored. There were also numerous inclusion clauses in most peace and alliance treaties of the Spanish Age. These clauses associated third parties, mostly allies of the actual treaty parties, to the treaties, albeit in a limited way. Inclusion was distinct from accession, by which a third party became a full partner to the treaty.⁵³ In general, inclusion only established a relation of *amicitia* between parties. The frequent use of inclusion and the fact that in many

⁵² The concept can be traced back to antiquity: Bederman, *International Law in Antiquity* (above, n. 7) pp. 190–2; Verena Epp, *Amicitia. Zur Geschichte personaler, sozialer, politischer und geistlicher Beziehungen im frühen Mittelalter* (Stuttgart, 1999) pp. 176–233; Lesaffer, 'Amicitia in Renaissance Peace and Alliance Treaties' (above, n. 21); Bruno Paradisi, 'L'amitié internationale. Les phases critiques de son ancienne histoire', *Recueil des Cours de l'Académie de Droit International*, 77 (1951) pp. 329–78; Heinhard Steiger, 'Die Friedenskonzeption der Verträge von Münster und Osnabrück vom 24 October 1668' (1998) 29 *Rechtstheorie*, pp. 189–210 at pp. 205–208; Ziegler, *Völkerrechtsgeschichte* (above, n. 7) pp. 82–90.

⁵³ Johan H. W. Verzijl stated that inclusion came down to accession, but offered no substantiation for that thesis: *International Law in Historical Perspective* (Leiden, 1973) vol. 6, p. 203. His thesis is incorrect. First, most treaties held specific clauses that were not applicable to the included parties without further negotiations. Secondly, from the sixteenth century on it became customary to nominate nearly all European powers in important peace treaties. For corroboration of my argument: Steiger, 'Der Westfälische Frieden' (above, n. 3) pp. 45–8.

peace treaties most, if not all, of the important European powers were included, meant that it was thought advisable and necessary to confirm the existence of a minimal legal order between the main European powers. That this had to be mentioned indicates that it no longer went without saying.

(d) *The Vitorian Conception of International Society*

From the second decade of the sixteenth century onwards, the turmoil, the fundamental changes and the crisis of the European legal order led to an unprecedented upheaval in scholarly thinking about the law of nations. Within the doctrine of the law of nations of the sixteenth and early seventeenth centuries, three major trends can be discerned.

The humanistic tendency started out as conservative. It was a reaction to the threatening loss of political and religious unity in Europe. Some humanists defended the traditional supremacy of the Pope and considered peace in Europe the most important responsibility of the Christian monarchs. To achieve this, several Spanish authors such as Antonio de Valdes (ca. 1490–1532) hoped for a unification of Europe under Charles V.⁵⁴

More significant for the further development of the law of nations was the second tendency, the so-called political tendency. Niccolò Machiavelli (1469–1527) cast a long shadow over this tradition. The Florentine politician was far ahead of his contemporaries. Machiavelli's thought was a reflection on the political situation of his time on the Italian peninsula. In Italy, the sovereignty of the various powers had become a reality earlier than in the other parts of Western and Central Europe. Thanks to their relative isolation during the major part of the fifteenth century, the Italian States functioned within a kind of interstate subsystem of their own. This system prefigured on a smaller scale the later European States system.

Machiavelli understood the danger of the collapse of supranational authority and the rise of sovereign powers. He also pointed to the growing gap between—Christian—morality and political reality. Machiavelli took the freedom of the State to its ultimate consequences by stating that the power of the prince was sufficiently legitimated by its own effectiveness and was in the last analysis independent of any de facto or higher moral authority. According to Machiavelli, this even implied that a prince, when the national interest demanded it, was not bound by a given word.⁵⁵ By

⁵⁴ Bosbach, *Monarchia Universalis* (above, n. 35) pp. 42–55; José Antonio Fernandez Santamaria, *The State, War and Peace: Spanish Political Thought in the Renaissance, 1516–1559* (Cambridge, 1977) pp. 35–56. Later in the sixteenth and seventeenth centuries humanist thought would, however, open paths in international legal thought. For a radical view (too radical in this author's opinion) on the influence of later humanism see Richard Tuck, *The Rights of War and Peace* (above, n. 28). See this author's book review in *Journal of the History of International Law*, 4 (2002) pp. 135–7.

⁵⁵ Hertfried Münkler, *Machiavelli. Die Begründung des politischen Denkens der Neuzeit aus der Krise der Republik Florenz* (Frankfurt, 1981) pp. 241–395; J. G. A. Pocock, *The Machiavellian Moment* (Princeton, 1975) pp. 157–61.

this proposition, Machiavelli put at risk the binding force of treaties and indeed the whole law of nations. With this provocation, the Florentine articulated the challenge which the European powers faced around the middle of the sixteenth century.

The third tendency, represented by the neo-scholastic Spanish school, would eventually offer a way out of the deadlock. This also applies, to a lesser extent, to thinkers such as Jean Bodin (1530–1596), Balthasar de Ayala (1548–1584) and Albericus Gentilis who entered more into the political tradition, although they could not be considered followers of Machiavelli. The Black Friar, Francisco de Vitoria and the Jesuit, Francisco Suarez were the principal representatives of the neo-scholastic current.

Vitoria's most famous writings on the international order and its law, his *Relectio de Indis* and his *Relectio de bello*, were in fact only concerned with the problem of the Spanish conquest in the New World.⁵⁶ They offered no systematic outline of the law of nations or the laws of war. Nevertheless, together with some parts of his commentaries on the *Summa Theologiae* of Saint Thomas Aquinas (1225–1274) and Vitoria's own treatise *De potestate civili*, these *Relectiones* allow us to reconstruct Vitoria's conception of the international legal order and the law of nations. Before discussing Vitoria's views, I will have to make an important disclaimer.

Vitoria's doctrine will be discussed here for the sake of the argument that many features of what among others Lauterpacht and Bull called the Grotian conceptions can already be found with Vitoria—a point already made by others—and to indicate that some elements of his doctrine captured the essence of what was to become the modern system of the law of nations two centuries after him. In doing so, I do not deny that the historical and intellectual context of Vitoria's writings was far different from the one of nineteenth- and twentieth-century international lawyers, nor do I claim that the evolution of doctrine from Vitoria onwards is a linear process. I only argue that some ideas and conceptions still hold some relevance and have proven to be relatively independent from their historical context. For the sake of this argument, I will here fall into the same trap as Lauterpacht, Bull and many others in discussing the Grotian tradition by separating Vitoria—albeit, I hope to an acceptable extent and without turning a blind eye to it—from his context and reading him in a distorting, anachronistic way.

First, Vitoria rejected the universal secular authority of both the Emperor and the Pope:

My first proposition is that the Emperor is not master of the whole world

⁵⁶ Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law', *Social and Legal Studies*, 5 (1996) pp. 321–36.

and

The Pope is not the civil or the temporal master of the whole world.⁵⁷

Vitoria stated that the world held different *respublicae*—States—that were all *communitates perfectae*. This Aristotelian–Thomistic concept implied, according to Vitoria, that these bodies politic were not part of a greater political entity.⁵⁸ All kinds of civil societies derived their existence from human nature and were therefore equal under natural law.⁵⁹

Nevertheless, all States or *communitates perfectae* were part of the one *totus orbis*: the international, universal society formed by mankind. The existence of such a universal society was also given in nature itself. In Vitoria's view, it was a society of *communitates perfectae*—which were of the natural order themselves—as well as of men. As the *causa finalis* or goal of the State was the common good of its citizens, so was the goal of the *totus orbis* the common good of mankind.

This *totus orbis* was under the rules and precepts of natural law.⁶⁰ However, in addition to natural law or natural *ius gentium*, Vitoria distinguished a human-made *ius gentium* without separating natural and human into two different and independent legal orders. The human law of nations could not contradict the divine or the natural law as the normative authority of man was vested in the divine will and the natural order. As such, it was far different from the modern concepts of positive law of nations of the writers of the later seventeenth and eighteenth centuries.⁶¹ However, Vitoria's concept of human *ius gentium* holds some relevance for the further evolution of doctrine in a different respect. If the ultimate source of authority of human and natural law was the same, human laws were promulgated by a different authority and therefore its sources were to be indicated. Vitoria distinguished several sources for the human law of nations. He discerned those rules that were agreed upon explicitly by the sovereign rulers of the *communitates perfectae*: treaty law. He also referred to customary law.

Most importantly for our purposes, he affirmed that there was a human law of nations that was of a universal standing. Its rules were

⁵⁷ Francisco de Vitoria, *Relectio de Indis*, 2, 1, 1 and 2, 2, 1 (Anthony Pagden and Jeremy Lawrence, eds.) *Political Writings* (Cambridge, 1991) pp. 253 and 260.

⁵⁸ 'A perfect community is therefore one which is complete in itself; that is, one which is not part of another commonwealth, but has its own laws, its own independent policy, and its own magistrates': Vitoria, *Relectio de bello*, 1, 2 (Pagden and Lawrence) *Political Writings* (above, n. 57) p. 301.

⁵⁹ Francisco de Vitoria, *De potestate civili*, 1, 2 (Pagden and Lawrence) *Political Writings* (above, n. 57) p. 9.

⁶⁰ On the Thomistic conception of natural law, on which Vitoria was very dependent, see Anthony J. Lisska, *Aquinas's Theory of Natural Law. An Analytic Reconstruction* (Oxford, 1996).

⁶¹ See on that: David Kennedy, 'Primitive Legal Scholarship' (1986) 27 *Harvard International LJ* pp. 15–20.

based on common consent among the members of the *totus orbis*, which he defined as the consent of the larger part of them:

But even on occasion when it [*ius gentium*] is not derived from natural law, the consent of the greater part of the world is enough to make it binding.⁶²

As such, Vitoria attributed law-making power to the *totus orbis* itself and rejected the need of consent by all. For him this was a very logical thing as the human law of nations was ultimately subject to and not independent of divine and natural law. But if one overlooks this fundamental difference from later positive law of nations—as most scholars have done—one sees him having the majority of States acting as representatives or institutions of the *totus orbis* and not as individual States. In this reading, Vitoria's definition of the human law of nations was not far different from that of contemporary *ius cogens*. But Vitoria's positive and universal *ius gentium* could be both interstate law in the modern sense of the law of nations, as well as universal private law in the Roman meaning of the word *ius gentium*. It has often been pointed out that Vitoria adapted the definition of Gaius's *Institutiones* and wrote '*inter gentes*' instead of '*inter homines*'.⁶³ He is thereby said to have changed the meaning of *ius gentium* from universal private law to interstate law. Nowadays, international legal historians agree that Vitoria did not take such a radical step. To him, the *totus orbis* was a society of both *respublicae* and men. He chose the word '*gentes*' or peoples and not '*respublicae*' or '*civitates*'. By doing this, he chose not to choose. '*Inter gentes*' therefore meant as much 'among the peoples' as it meant 'between the peoples'.⁶⁴ Therefore, in no way did Vitoria's definition of the human law of nations preclude the application of general or universal principles and rules of private law to interstate relations nor did he conceive of a particular and specific law of nations independent of and untouchable by general notions of what is law, reason or justice.⁶⁵

Vitoria's rejection of the existence of any effective universal authority above the sovereign powers clearly did not imply the affirmation of

⁶² Vitoria, *Relectio de Indis*, 3, 1, 8 (above, n. 57) p. 281.

⁶³ 'What natural law had established among all nations is called the law of nations': Vitoria, *Relectio de Indis*, 3, 1, 2 (above, n. 57) p. 278. See: Gaii *Institutiones* 1.2.1.

⁶⁴ For the debate on this fragment: Grewe, *Epochs of International Law* (above, n. 9) pp. 25–6; Kennedy (above, n. 61) pp. 20–1; Josef Soder, *Die Idee der Völkergemeinschaft. Francisco de Vitoria und die philosophischen Grundlagen des Völkerrechts* (Frankfurt and Berlin, 1955) pp. 66–8; Jo Verhoeven, 'Vitoria ou la matrice du droit international', in *Actualité de la pensée juridique de Francisco de Vitoria* (Brussels, 1988) p. 121.

⁶⁵ Vitoria's concept of the law of nations comes close to Hersch Lauterpacht's definition and corroborates his views, and those of many other twentieth-century international lawyers, on the application of general principles of (private) law to public international law: 'International law is the body of rules of conduct, enforceable by external sanction, which confer rights and impose obligations primarily, though not exclusively, upon sovereign States and which owe their validity both to the consent of States as expressed in custom and treaties and to the fact of the existence of an international community of States and individuals. In that sense, international law may be defined (though perhaps less usefully), as the law of the international community': 'International Law—The General Part', in E. Lauterpacht, *International Law* (above, n. 14) vol. 1, p. 9 and see p. 34.

absolute sovereignty. His concept of sovereignty was, faithful to the medieval tradition, a relative one.⁶⁶ The States and princes were subject to the common good of the *totus orbis* and its binding legal rules, both natural and positive. But in the absence of any superior authority, how and by whom could these rules be enforced? Vitoria's answer was as simple as it proved to be realistic: by the highest authorities within the international society, the sovereign powers themselves. According to the Salamanca theologian, the sovereign princes were not only responsible for upholding their own rights, but also for the common good of the *totus orbis* and thus for the enforcement of the law of the *totus orbis* as well.⁶⁷ Vitoria also limited the right of the sovereigns to wage war and adhered to the medieval doctrine of the just war. While each individual could use violence in self-defence—a right vested in natural law—the sovereign powers could resort to war to restore or avenge an injury.⁶⁸ However, they should be careful that the war would not bring more harm than the injury to which it was a reaction.⁶⁹

Vitoria was, however, aware of the realities of his day and understood that the discriminatory concept of the just war was no longer tenable. A consequent application of the just war doctrine meant that only one of the belligerents was fighting a just war and could therefore benefit from the application of the laws of war. In the absence of any superior or neutral authority to judge over the claims of the belligerents, this discrimination had become empty. Vitoria thus introduced the concept of the just war on both sides—*bellum iustum ex utraque parte*. While in truth only one belligerent could have just cause, sovereign princes could be excused to assume that they both held a just cause. However, the princes had to act in good faith. As such, Vitoria preserved the demand for a belligerent to be able legally to justify his resort to violence and rejected complete licence:

Where there is provable ignorance either of fact or law, the war may be just in itself for the side which has true justice on its side, and also just for the other side, because they wage war in good faith and are hence excused from sin.⁷⁰

Vitoria formulated an answer to problems caused by the collapse of the old order and the emergence of absolute sovereign powers, albeit that was not his main concern. His concern was, however, similar. He understood that the old Christian system was irrelevant to capture the relations of Europe with the New World. Through this perspective, he greatly contributed to a more truly universal and less Christian approach of international law and relations.

⁶⁶ Vitoria referred to *Per venerabilem*: Vitoria, *Relectio de Indis*, 2, 1 (above, n. 57) p. 257.

⁶⁷ Vitoria, *Relectio de bello*, 1, 1 (above, n. 58) p. 298.

⁶⁸ Vitoria, *De potestate civili*, 1, 4 (above, n. 59) p. 11; idem, *Relectio de bello*, 1, 2, 1–2 (above, n. 58) pp. 299–300. Vitoria accepted the binding character of treaty obligations as being self-evident: *De potestate civili*, 3, 4, p. 40.

⁶⁹ *Ibid.*, 1, 10, pp. 21–2.

⁷⁰ Vitoria, *Relectio de bello*, 2, 4, 2 (above, n. 58) p. 313.

Though he may not have known all Machiavelli's relevant writings, Vitoria formulated a workable and broadly acceptable answer to the Florentine's provocation. He returned to a relative concept of external sovereignty. The sovereigns may not be subjected to an effectual authority, they were part of a greater whole and were subject to a binding set of rules, both natural and human made. The international society thus held an autonomous law-making power. With that, Vitoria took a step ahead of what Bull and Lauterpacht considered to be the Grotian conception. They only stressed the need for an ultimate source of international law transcending the will of States. At least Lauterpacht did not *necessarily* imply the creation of new rules but only the acceptance of existing rules, the so-called general principles of law.⁷¹ With the *ius cogens*, the late twentieth-century system of international law has so far lived up to Vitoria's notion. Vitoria did not restore the authority of the *ius commune* as a sufficient source for this universal law of nations, though just like Grotius later he would not have denied that the Roman—and canon law in Vitoria's case—often gave expression to what was to be considered natural or human *ius gentium*. The source of the human law of nations was the consent of the greater part of the international society, with which he meant general customs. However, Vitoria's conception could also be said to encompass rules of *ius cogens* emerging from multilateral conventions as we know them today. In any case, Vitoria's conception came close to describing the new law of nations that was to emerge long after he had died.⁷²

The Vitorian conception of international society and law is strikingly similar to what Lauterpacht and Bull understood the Grotian conception to be. Vitoria saw the international society as a mixed society of States and men. The sovereign powers were subject to legally binding rules that were vested in natural law. Next to that, the international society as a whole could create new law and impose it upon powers that had not assented to it. The sovereigns were considered responsible for upholding

⁷¹ 'None of these [positivistic] doctrines can be accepted as accurate except to the extent that... new rules of international law become binding upon States only with their consent... It would seem, therefore, that to regard the will of States as the exclusive source of the validity of international law is to confuse the creation, by treaty or custom, of new law—for which in general, the consent of States is required—with, in the wider sense, the establishing and the binding force of international law as whole': Lauterpacht, 'International Law—The General Part' (above, n. 65) pp. 56–8.

⁷² For some recent assessments of Vitoria's thought: Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' (above, n. 56); Jörg Fisch, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (Stuttgart, 1984) pp. 209–25; Peter Haggenmacher, 'La place de Francisco de Vitoria parmi les fondateurs du droit international', in *Actualité de la pensée juridique de Francisco de Vitoria* (above, n. 64) pp. 27–80; Kennedy (above, n. 61) pp. 13–40; Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500–c. 1800* (New Haven, 1995); Alfred P. Rubin, 'International Law in the Age of Columbus', *Netherlands International Law Review*, 39 (1992) pp. 5–35; Karl-Heinz Ziegler, 'Völkerrechtliche Aspekte der Eroberung Lateinamerikas' (2001) 23 *Zeitschrift für Neuere Rechtsgeschichte* pp. 1–29 at pp. 5–13.

order, and the distinction between just and unjust wars was asserted. Nevertheless, Vitoria accepted that in the current state of affairs this distinction had no practical implications.

Vitoria's basic ideas can by and large also be found in the works of Suarez and the other neo-scholastic authors. The idea that the loyalty towards contracts and treaties was based on natural law and therefore offered a strong basis for positive international law was more explicit in the works of Jean Bodin, Albericus Gentilis and Hugo Grotius. It has been the merit of this last author of achieving a synthesis of the still heavily theological and political thinking of the neo-scholastic school and of the humanist and political thinkers and offering a practical and autonomous doctrine for the law of nations.

(e) *The Structure of the Law of Nations at
the end of the Spanish Age*

In the light of all this, it becomes possible to assess the structure and fundamental characteristics of the law of nations, as it had developed by the early 1600s.⁷³ A first question to be asked concerns the subjects of the law of nations. Following the final imperial and papal failure of re-establishing their supremacy over Europe, the sovereign princes in Europe had become the major subjects of international law. They had reached external sovereignty. This does not mean that full internal sovereignty was achieved. The European powers were not perceived as abstract bodies. On the international field, the rulers themselves, mostly hereditary princes, acted as subjects of the law of nations. Within their jurisdiction many princes had to endure the competition of powerful vassals, who time and again directly interfered in political and juridical matters at interstate level. During the first six decades of the seventeenth century, almost all important countries of Western Europe were plagued by uprisings and civil wars. Only from around 1660 onwards had the central State apparatus acquired enough power to avoid this for the future or at least to reduce it to an internal problem.

The second question deals with the basic concepts which shaped the international society and the sources of the law of nations. During the whole of the Spanish Age, the Latin West, the *respublica christiana*, was considered to form a community of Christian princes and republics. The Reformation did not put an end to this idea. What is certain is that the Reformation and the rise of the sovereign State caused a profound structural crisis within the system. The disappearance of the Pope as a universal leader in Europe and the decline of the leading role of canon and feudal law threw the sovereign powers onto their own resources for the creation

⁷³ Hedley Bull used three criteria to capture the essence of a given international society. I have adapted them to a more juridical analysis for my purpose. Bull, 'The Grotian Conception' (above, n. 15) p. 52.

of rules of law. The law of nations disintegrated to a significant extent into a series of particular laws of nations. Custom as a source of general law of nations still had to assert itself. The Christian community, the *respublica christiana*, entered temporarily a relative structural and juridical vacuum.

The third question concerns the enforcement of law and the right to wage war. For on this point, external sovereignty was already as good as complete at the beginning of the Spanish Age. As law had to be enforced by the sovereigns themselves, being the supreme powers within the international society, war was considered the ultimate instrument of law enforcement in the international context. A neutral authority no longer being available for judging the claims made by sovereign princes, the just war doctrine was watered down and the freedom of the sovereigns to resort to war became almost unlimited. From the treaties it appeared that the sovereigns, entirely in line with the ideas of Vitoria, considered themselves to be the lawful custodians of the European legal system. But as they were the only ones to judge the legitimacy or the opportunity of their actions in the interests of the international society, they were all the more at liberty of defending their own interests, if necessary by force.

The achievement of external sovereignty around the middle of the sixteenth century signified the final end of the medieval concepts about the European legal order. This did not mean that the modern States system was thereby born. Before that happened, there would be a period of relative absence of international law and of order.

The crisis of the international system was intensified and prolonged by the instability in the whole of Europe, and more particularly in France, the Netherlands and the Holy Roman Empire, as a result of the Reformation. The internal instability of these powers delayed the formation of States, with the result that the development of a new international legal order was slowed down.

III. THE LAW OF NATIONS DURING THE FRENCH AGE

(a) *The Treaties of Westphalia (1648)*

The development of an international system based upon the sovereign State could only truly gather momentum in the decades following the Treaties of Westphalia. The two Peace Treaties of 24 October 1648 signed at Münster between the representatives of the Holy Roman Empire and France and at Osnabrück between the representatives of the Holy Roman Empire and Sweden, put an end to the Thirty Years' War. With this the last major religious war in Europe came to an end. The Peace Treaties held detailed stipulations regarding political, constitutional and religious matters of the Empire. Until the abolition of the

Empire in 1806, these provisions would remain an important basis for its organization. In that sense, the treaties had a fundamental significance for the stabilization of Central Europe and for the neutralization of the religious division as a source for open conflicts in that area. The Treaty of Münster of 30 January 1648 had already ended the conflict that had been dragging on for eighty years between the Spanish kings and the Republic of the Northern Netherlands.

Traditionally, it has been alleged that the Westphalian Peace Treaties laid down the basic principles of the modern law of nations, such as sovereignty, equality, religious neutrality and the balance of power safeguarded through a system of guarantees. However, this cannot be sustained by a careful analysis of the treaties and a comparison with earlier treaties. These principles cannot be found in any of the three main Westphalian Treaties, at least not as principles of the law of nations. In fact, any references to them were made in the context of the internal settlement of peace within the Holy Roman Empire and as such the principles were certainly not new or innovative. It was only some decades after 1648 that diplomats and jurists started to see these clauses as reflecting upon the law of nations. The hybrid character of the two treaties of 24 October 1648 can explain this transposition of what were essentially internal, constitutional settlements of the Holy Roman Empire to the European legal order. These treaties were at the same time international peace treaties between the Emperor, the estates of the Empire and a foreign power as well as internal settlements for the Empire. The clauses that lay down international peace were far from original and do not allow for an assessment of the treaties as constituting a caesura in the technical-juridical development of peace treaty practice and law.⁷⁴

Nevertheless, the period of the Westphalia Treaties and the decade that followed them saw a thorough change in the development of the European legal order as a whole. The 1648 Peace Treaties put an end to the last lengthy and bitter religious war in Europe. They also succeeded in more or less pacifying the Holy Roman Empire and thereby gave some kind of stability to Central Europe. Moreover, the 1640s, 1650s and 1660s saw the last important rebellions and civil wars for some time to come within the main European powers such as the Empire, France, Spain and England. These decades thus marked the end of a century of religious strife and civil turmoil that had wrecked the old European order and prevented the emergence of a new one. As such, the crisis of the European legal order ended with Westphalia. The Treaties may not have laid down the principles of the new, modern law of nations and the new, modern States system. They did, however, help in creating the political and religious conditions necessary to allow the European

⁷⁴ For a detailed analysis of the Westphalia treaties in the light of prior peace treaties see Lesaffer, 'The Westphalian Peace Treaties' (above, n. 3).

powers to start building a new order and a new law system.⁷⁵ In other words, the 'modern law of nations' and 'the modern State system' only emerged in the decades *after* Westphalia. Its most important features were only laid down by the beginning of the eighteenth century. The first peace treaties expressly to state some of them more clearly were the Utrecht Peace Treaties of 1713.

(b) *The Dualistic Character of the Law of Nations in the French Age*

The second half of the seventeenth century and the early decades of the eighteenth century saw the development of the modern law of nations, then referred to as the *ius publicum Europaeum*. The study of treaties and customary law is required for this period more than for the previous one. After Grotius and under the influence of the positivist current, doctrine increasingly played a servile role to practice. Nevertheless important innovations continued to arise from doctrine.

In the first place, a further advance of the sovereign state characterized the period. Following external sovereignty, internal sovereignty was now achieved to a large extent. After the great uprisings of the seventeenth century had been crushed—like in Catalonia (1640–1653)—or had led to the formation of new independent powers—as had been the case with the Dutch Republic (1568–1648) or Portugal (1640–1668)—the monopoly of the sovereign rulers upon international relations was only exceptionally contested. After 1660 non-sovereign entities no longer concluded treaties themselves. The separation between the internal and international legal orders became real.

This evolution went together with the loss of the personal character of treaties. More and more the 'State' as an abstract corporation took the place of the personal ruler as treaty partner and as subject under the law of nations. Private affairs such as matrimony and arrangements concerning the patrimonial goods of the princes disappeared from peace and alliance treaties. On the other hand, matters of succession received more attention. Almost systematically the dynastic rights of the sovereigns were made subordinate to the higher, public interests of the State and to the protection of peace in Europe.⁷⁶

⁷⁵ See the authorities cited above in n. 17 as well as Heinz Duchhardt, 'Westfälischer Friede und internationale Beziehungen in Ancien Régime', *Historische Zeitschrift*, 248 (1991) pp. 529–43; Randall Lesaffer, 'La dimencion internacional de la paz de Westfalia: un enfoque juridico' in *350 años de la Paz de Westfalia 1646–1998. Del antagonismo al la integracion en Europa* (Madrid, 1999) pp. 33–54.

⁷⁶ See e.g. the treaties of partition that were made in order to carve up the lands of the childless Spanish-Habsburg king Charles II (1665–1700): Treaty of Loo of 24 September 1698, in Clive Parry, *The Consolidated Treaty Series* (Dobbs Ferry, 1969–1981) (hereafter 'Parry') vol. 22, pp. 197–206; Treaty of London of 13 March 1700, in Parry vol. 22, pp. 471–82.

The sovereigns were still mentioned as treaty partners. But increasingly their titles were used instead of their names.⁷⁷ This indicated that the sovereign acted as a representative, as an institution of the State, not in his own name. The State was no longer committed on the basis of an indirect promise or guarantee given by the sovereign but on the grounds of a universal mandate or authority held by the ruler in order to make undertakings in the name of the State and his—or better its—subjects.

In the second place, some words need to be said on the basic concepts that underlie the international society and on the sources of the law of nations. The formation of the European States system from the later seventeenth century onwards was not a one-sided process towards more sovereignty. Although the principle of State sovereignty may have been central in the formation of a new European legal order out of the chaos of the wars of religion, inevitably the process encompassed some elements that in their nature curtailed sovereignty, or would do so in the future. Even the organization of a system of sovereign States entails a certain limitation of sovereignty. From the moment it started to take shape, the modern States system was on its way to become an international society with a dualistic character. On the one hand, it was a system of sovereign States without a real central authority. On the other hand, it was a society whose members shared and commonly accepted some basic values and institutions—including a set of binding rules of law.

What then were the features opposing sovereignty, which allow for an assessment of the modern States system as a dualistic system? First, the European order could only function if two basic rules were commonly accepted: *pacta sunt servanda* as a basis for the validity of treaties and the right to defend one's own legitimate claims, if necessary with violent means. Treaty practice made it abundantly clear that these two rules were implicitly accepted as underlying the whole legal order and that they were considered to be natural; that they belonged to the *ius naturale*. By this, the existence of at least two rules was accepted; rules that were independent from the will of States and of a basis of obligation or an ultimate source for the law of nations, which transcended the will of States.⁷⁸ Though the seventeenth and eighteenth centuries saw the rise of the *clausula rebus sic stantibus* and many breaches of treaties were condoned by the international community, the rule of *pacta sunt servanda* was often invoked by States. As States, or even more importantly coalitions of States, in some cases have even threatened war or gone to war to enforce treaties in the interest of tranquillity and security within Europe, one could say that the rule of *pacta sunt servanda* was considered to be externally enforceable;

⁷⁷ Grewe, *Epochs of International Law* (above, n. 9) p. 361.

⁷⁸ Compare with: Hersch Lauterpacht, 'The Nature of International Law and General Jurisprudence', in E. Lauterpacht, *International Law* (above, n. 14) vol. 2, p. 15; idem, 'International Law—the General Part', in *ibid.*, vol. 1, pp. 56–8.

again, in accordance with Vitoria's ideas, by the highest authority within the international society. To a certain extent, the rule set a limit to the free arbiter of States.⁷⁹

Second, the modern system was constituted through a series of important Peace Conferences and Peace Treaties, such as those of Westphalia, Nijmegen (1678–1679), Rijswijk (1697), Utrecht-Baden (1713–1714) and Aachen (1748). Admittedly with the exception of the Aachen Congress, these conferences always resulted in a series of bilateral agreements, but indeed many European powers were involved in them. In these treaties, a number of compromises were made over territories, succession, colonies and trade—always the main reasons for disputes during the seventeenth and eighteenth centuries.⁸⁰ It became customary in later peace and alliance treaties to refer to these major treaties as the fundamental agreements on which the European order was founded. They came to be regarded as a kind of constitutional act for the construction of a peaceful European order.⁸¹ One could, to a certain extent, compare their legal and political force with that of those multilateral conventions of the twentieth century that bind the vast majority of States and that are considered to lay down basic rules of general international law, foremost among

⁷⁹ Furthermore, one should not be too much misled by the fact that natural law was considered to be binding primarily *in foro interno*, in conscience. See e.g. Hugo Grotius, *De Iure Belli ac Pacis libri tres*, *Prolegomena* 20, B. De Kanter-Van Hetinga Tromp (ed.) (Leiden, 1939; reprint Aalen, 1993) p. 13. See: Albert Dufour, 'Grotius et le droit naturel du dix-septième siècle', in *The World of Hugo Grotius (1583–1645)* (Amsterdam, 1984) pp. 15–41; V. Hanga, 'L'idée de droit naturel dans le *De Iure Belli ac Pacis*', *Grotiana*, new series 4 (1983) pp. 38–45; Kennedy (above, n. 61) pp. 7–8; Hendrik Van Eikema Hommes, 'Grotius on Natural and International Law', *Netherlands International Law Review*, 30 (1983) pp. 61–72. See on other early modern thinkers: Emmanuelle Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Paris, 1998) pp. 151–219. It would be wrong to tarnish early modern natural law with the stain laid by nineteenth- and early twentieth-century authors on natural law. To the writers of the seventeenth and even early eighteenth century, obligation *in foro interno* was more than just moral obligation; at the most it implied that external means of enforcement were absent but it deducted nothing of the juridical character of natural law. To them, natural law was far more 'law' than natural law or even the law of nations was to the nineteenth century deniers of the legal character of international law and those followers of John Austin (1790–1859), who believed that there could be no law without superior, external authority. It was a moral ideal, but a binding one: a lighthouse the States *had to* steer to. Though not always enforceable by external means in their view, it was to a more limited extent *legally* binding. As such it was similar to what the *ius commune* had been for rulers and judges in national and local courts during the later Middle Ages. On the *ius commune*: Manlio Bellomo, *The Common Legal Past of Europe 1000–1800* (Washington, 1995) esp. pp. 152–5. Moreover, authors such as Grotius indicated that in some cases natural law precepts were externally enforceable. In Grotius's view violations of some precepts of natural law like cannibalism and piracy were punishable by sovereigns, even if not committed against themselves. See Tuck, *The Rights of War and Peace* (above, n. 28) pp. 102–3.

⁸⁰ Kalevi J. Holsti, *Peace and War: Armed Conflicts and International Order 1648–1989* (Cambridge, 1991) pp. 43–70.

⁸¹ Steiger rightly pointed out that before the eighteenth century these references to Westphalia were mostly limited to treaties in which the Empire was involved and hung together with the fact that the Westphalia Treaties were part of the imperial constitution: 'Der Westfälische Frieden' (above, n. 3) pp. 59–62. Here again a kind of transposition from the German to the European level took place.

them the UN Charter—at least before the emergence of *ius cogens* and before it was considered to encompass rules of *ius cogens*. Formally, these early modern treaties were nothing but treaties, so that from a strictly formal point of view there could not be a hierarchy among them. But the European society—or at least the interested great powers—would not stand a breach of these treaties, not even by those States that had not adhered to the treaty, nor allow for a State unilaterally to withdraw *ad nutum*.⁸² Even States would not be allowed to conclude a bilateral treaty in clear contradiction of important clauses from the older, fundamental set of treaties in which the main European powers were involved. As such, from a material point of view, there was a juridical difference between the two kinds of treaties. If there was no strict hierarchy of treaties from a formal point of view, there was a hierarchy of rules from specific treaties. During the eighteenth century, the great powers regarded themselves as the guarantors of the order laid down in these treaties, as will be discussed below.⁸³

Third, late seventeenth- and eighteenth-century treaties make it very clear that the sovereign powers still considered themselves very much to be part of an integrated system. In peace and alliance treaties, the parties went on to justify their agreement as being in the interest of the whole. This was less and less referred to as 'Christian', while the name 'Europe' was on the rise. One can see a shift from a religious to a more civilizational concept of the international society.

Fourth, the common good that treaties were said to strive for now became the 'tranquillity' and 'security' of Europe and its States. Peace treaty clauses were said to be fundamental to guarantee these while, during the eighteenth century, coalitions were increasingly justified as instruments for upholding peace and security. Of course, 'tranquillity' and 'security' were in themselves political and not juridical notions.

Fifth, the references to the tranquillity and security of Europe and its States have to be read in the context of the doctrine of the balance of power. This doctrine implied that a global balance of powers between the States would safeguard the European order. This balance was not achieved through factual equality of all States, but by the formation of equilibrated coalitions. When one of the States became more powerful than the coalition of all the other States within the system or within a subsystem—such as Sweden in the Baltic—this meant a fundamental disruption of the balance and a threat to the liberty and sovereignty of all European States. In order to prevent unbalanced situations, some

⁸² See on those multilateral conventions: Lauterpacht, 'International Law—The General Part' (above, n. 65) pp. 59–60.

⁸³ Only with the introduction of the concept of *ius cogens* in the 1960s would the international society make it explicit that some rules from these treaties were placed higher in the hierarchy of norms than ordinary treaty clauses and transcended their material source.

authors even accepted the concept of preventive wars.⁸⁴ The system of the balance of power was therefore inseparably linked with the doctrine of sovereignty and—juridical—equality of States. The balance of power also served, and in practical terms served even more, for guaranteeing the freedom of States, more than for the protection of peace. In reality, the doctrine was more frequently used as an alibi for war than as a guarantee for peace. Furthermore, the doctrine provided a convenient and flexible argument for justifying a war as being in the higher interests of the international society.⁸⁵ But the doctrine also exemplified the dualistic character of the modern law of nations. Whereas it was closely associated with the principle of State sovereignty, it presupposed the existence of an integrated system and implied an overriding common good it was said to serve. While many examples could be quoted to indicate its abuse to justify the actions of States, sometimes it was invoked to reduce the freedom of States. The single most famous example of this was the Utrecht compromise on the Spanish succession, whereby the French and Spanish kings had to accept the curbing of the normal rules of dynastical succession in the name of peace and the balance of power.⁸⁶ In two of the Utrecht Peace Treaties of 1713 and various other treaties of the eighteenth century the balance of power was explicitly invoked as a justification for the agreement.⁸⁷ However, these explicit invocations were rather exceptional.⁸⁸ This somewhat surprising conclusion nevertheless does not imply that the doctrine was not fundamental to the States system and its treaty practice. It was the theory underlying and explaining the many references to tranquillity and security, as it expressed a mechanistic view on the States system: whatever happened within the system and affected the position of one reflected upon the many and the whole.

Sixth, in many peace and alliance treaties of the later seventeenth and the eighteenth centuries, another institution came to the foreground: the

⁸⁴ Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* 6, 640 and 649, *Classics of International Law* (Oxford, 1934) vol. 13-1, pp. 234-5; Emer de Vattel, *Le droit des gens, ou principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et des Souverains* 3, 3, 42-45, *Classics of International Law* (Oxford, 1913) vol. 5-2, pp. 32-8.

⁸⁵ On the balance of power: Herbert Butterfield, 'The Balance of Power', in Butterfield and Wight, *Diplomatic Investigations* (above, n. 15) pp. 132-48; Evan Luard, *The Balance of Power. The System of International Relations, 1648-1815* (Basingstoke, 1992); Arno Strohmeyer, *Theorie der Interaktion. Das europäische Gleichgewicht der Kräfte in der frühen Neuzeit* (Vienna, Cologne and Weimar, 1994); Martin Wight, 'The Balance of Power and International Order', in Alan James (ed.), *The Bases of International Order* (London, 1973) pp. 85-115.

⁸⁶ Treaty of Utrecht between Britain and France of 11 April 1713, Art. 6, in Parry (above, n. 76) vol. 27, pp. 482-3; Treaty of Utrecht between Britain and Spain of 13 July 1713, Art. 2, in Parry (ibid.) vol. 28, pp. 299-300. See also below, n. 87.

⁸⁷ 'And whereas, to take away all uneasiness and suspicion, concerning such conjunction, out of the minds of people, and to settle and establish the peace and tranquillity of Christendom, by an equal balance of power': Treaty of Utrecht between Britain and Spain of 13 July 1713, Art. 2, in Parry (above, n. 76) vol. 28, p. 299 (English translation p. 325) and Treaty of Utrecht between Spain and Savoy of the same date, Art. 3, in Parry (ibid.) vol. 28, p. 274.

⁸⁸ Heinz Duchhardt, 'The Missing Balance', *Journal of the History of International Law*, 2 (2000) pp. 67-72.

guarantee. This can hardly be explained outside the context of the balance of power theory and its basic assumption that Europe was an integrated system in which the security of the one reflected upon the security of another. This institution was quite common in treaty practice from the years 1660 onwards until the middle of the eighteenth century. The signatory partners named third powers as guarantors for their own compliance with the treaty. These guarantors accepted to assist the prejudiced party, if necessary with forceful action, for the recovery of its rights, in cases of violations of the treaty. From the Utrecht Peace Treaties onwards, when important treaties became increasingly multilateral, this institution was replaced by the treaty clauses of mutual guarantee, given by the parties to the treaty themselves. This was a useful formula from the moment that more than two parties were involved in a treaty or in the agreements spread over several treaties. In that case coalitions could be formed against a non-complying treaty partner. The guarantee gradually replaced the old inclusion clauses. The development of a new legal order made the inclusion of third parties, as an instrument for generalizing *amicitia*, superfluous. The guarantee became a more useful formula than the old inclusion, with more concrete juridical consequences, for the involvement of third parties in a treaty. The system of guarantees gave expression to the Vitorian conception of shared responsibility for the common good of the international society.

Seventh, the theory of the balance of power and the guarantee mechanism were also associated with another form of hierarchy, not of norms but of States. The doctrine of the balance of power as well as the guarantee led to the recognition of the special role to be played by some great powers within the community of States. Although in principle each sovereign State had to play its part in the protection of the international order, in practice this mission was taken on by some great powers. The balance of power was in the first place the balance between the great powers. The treaties that were considered fundamental for the European system rested especially upon a consensus between the great powers.⁸⁹

In the third place, the question under which circumstances a war was considered as legitimate had to be discussed. For this, the freedom of the sovereign powers to wage wars became possibly even greater than in the previous period. The treaties continued to pay lip service to the doctrine of the just war. Wars were still justified as reactions to inflicted injustice. But in reality, the justifications lost even more of their substance. First, the doctrine of the balance of power provided the States with an additional

⁸⁹ Andreas Osiander has pointed out the importance of the 'Great Power principle' for the nineteenth and twentieth centuries in *The States System of Europe 1640-1990. Peacemaking and the Conditions of International Stability* (Oxford, 1994), pp. 321-30. Here I claim it to be prefigured in eighteenth-century practice.

justification for waging wars, even preventive wars. Second, this very doctrine allowed war not only for the defence of legal rights, but also for political interests, *intérêts* as they were referred to in the treaties.

The law of nations in the French Age was dualistic. On the one hand, the sovereignty or freedom of the States was further enhanced during this period, especially in the field of law enforcement and warfare. The licence of the States for waging wars in defence of their own rights or interests was almost unlimited. The Vitorian idea that the States as the highest sovereign power were in charge of the international system could only expand this licence.

On the other hand, following the crisis of the late sixteenth and early seventeenth centuries, international society and legal order were restored. Though the new order was a system of sovereign States, the process automatically implied a reduction of the sovereignty of the States. The recognition of the existence of a number of basic rules from natural law shows that there were rules transcending the will of States, though they were not externally binding. The hierarchy of norms, although prudently developed and far from effective, imposed another restriction upon the free institution of law by the States. This hierarchy only made sense if a distinction was accepted between fundamental treaties and ordinary treaties. The fundamental treaties were agreements comprising the basic principles of international law and were significant for the entire international society. They came into being at multilateral conferences, involving most European States. From there it is only a small step to conclude that these treaties in fact expressed the will of the international society. Therefore, one can speak of autonomous lawmaking by the international society. Law could be created by a consensus between most of the States or between the great powers. The Vitorian doctrine of the *consensus maioris partis totius orbis* could be applied here.

IV. THE TWENTIETH CENTURY: CONTINUITY AND CHANGE

It is time to reach certain conclusions. First, the evolution of the European States system and the modern law of nations during the later seventeenth and the eighteenth centuries was a dual process. On the one hand, a system based on a very far-reaching concept of State sovereignty was construed. On the other hand, paradoxically, the very construction of such a *system* limited the sovereignty of the States it was based upon. It was during this period that the crisis of the European legal order was overcome through the introduction of new elements that curtailed the freedom of the States, even if these were more limited and less effective than the medieval ones they came to replace. As was already pointed out, the modern law of nations was more 'Grotian' and less 'Hobbesian' than the traditional dialectical opposition of the modern and twentieth-century systems

concedes. If there was ever a Hobbesian system with truly sovereign States, it was before Westphalia, not after.

This first conclusion forces us to reassess the traditional views on the early modern States system and, by consequence, on the paradigm shift of the twentieth century. The continuity between the modern era and the twentieth century seems to be greater than is normally accepted. Of course, one cannot deny that the international society and international law have seen tremendous changes during the last century. The emergence of international—and above all supranational—organizations is the least predicted of them, but it also has to be pointed out that the most powerful body of the United Nations adopted the great power principle, which became central to the modern law of nations (the power to veto in the UN Security Council). However, the changes of the last century are to a great extent the continuation and radicalization of a historical process that dates back to the late seventeenth century. Of course, the eighteenth and nineteenth centuries saw the high days of State voluntarism in practice and of positivism in doctrine, but that does not mean that there was no counter-current. It has become time to highlight this dark side of the moon.

In the history of international law since the late seventeenth century, important caesurae can be discerned. The era of the Northern American, the French and the Latin American Revolutions, when the doctrine of self-determination of peoples⁹⁰ and constitutional rights were introduced and the expansion of the European States system began in earnest, is presumably the foremost, as Steiger suggested. In the perspective of a 500-years evolution we took here, it seems far more important than the World Wars of the previous century as a starting point for these innovations, while of course these only came to the full during the twentieth century.⁹¹

Second, the 'Grotian tradition' has far stronger roots in early modern State practice than most international lawyers and international relations theorists of the twentieth century assumed; it went back way beyond Hugo Grotius to Francisco de Vitoria.⁹² This has been recognized before, for example by Wilhelm Grewe.⁹³ Indeed, the contemporary international

⁹⁰ Antonio Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (Cambridge, 1995) pp. 11–14.

⁹¹ Heinhard Steiger, 'Vom Völkerrecht der Christenheit zum Weltbürgerrecht. Überlegungen zur Epochenbildung in der Völkerrechtsgeschichte', in Heinig, Jahns, Schmidt, Schwinges and Wefers (eds.), *Reich, Regionen und Europa im Mittelalter und Neuzeit* (above, n. 17) pp. 171–187; translated as 'From the International Law of Christianity to the International Law of the World Citizen' (2001) 3 *Journal of the History of International Law*, pp. 180–193.

⁹² Vitoria's concept of the just war on both sides allowed for much more licence than the post-World War II system does. But so did Grotius's. He only affirmed the just war doctrine within the context of natural law, which to him was binding *in foro interno*. In positive law, Grotius distinguished the solemn war. For a war to be solemn and thus lawful, it had to be waged by a sovereign and to be formally declared. In fact, Grotius thereby took a step further away from the just war tradition than Vitoria had and contributed to the watering down of the *ius ad bellum* and its restrictions. Haggemacher, *Grotius et la doctrine de la guerre juste* (above, n. 2) esp. pp. 575–9.

⁹³ *Epochs of International Law* (above, n. 9) p. 192.

society corresponds largely to Vitoria's conception thereof: the existence of a universal society both consisting of sovereign States and men, the acceptance of some basic precepts of natural law like the right to self-defence, the binding character of obligations and other inalienable rights of individuals and peoples (international protection of human rights), the attribution of an autonomous law-making power to the international society transcending the need for individual acceptance by each State but based on the consent of the larger part of the society (*ius cogens* and general principles of international law under Article 38 of the ICJ Statute⁹⁴) and the common responsibility for upholding order (Chapter VII of the UN Charter). Vitoria's conception cannot even be said to be incompatible with the emergence of supranational organizations.⁹⁵ He himself envisaged that at least the Christian princes would elect a 'universal monarch', whereby their States would cease to be *communitates perfectae*. They could even decide upon this by a majority vote.⁹⁶

In truth, Vitoria's just war doctrine falls short of the stricter *ius ad bellum* laid down in the UN Charter, as he introduced the concept of subjective justice of cause, though it is only fair to repeat that, at the same time, he limited the States' licence by calling illegal every war that did more harm than good to the international society. This was a consequence of the principle of common responsibility. Moreover, during the twentieth century the revival of a discriminatory concept of war has rarely been accompanied by the revival of a discriminatory concept of peace. The 1919 Peace Treaties of Paris, the Treaties with the European allies of Germany and with Japan after World War II and the 1991 Peace Settlement ending the Second Gulf War against Iraq stand out as famous exceptions to this.⁹⁷ In all, current practice has not moved so far from Vitoria's and Grotius's distinction between the ideal of natural law and the reality of positive law.

This article has given the place of honour to Vitoria rather than Grotius. Would it be fair to go so far as to propose striking Grotius's name from Lauterpacht's and Bull's Grotian tradition and replacing it with Vitoria's? It would not. First, Vitoria had little or no direct influence on most seventeenth- and eighteenth-century writers. It was only

⁹⁴ Compare with: 'Common consent is the basis of all law... "Common consent" can therefore only mean the express or tacit consent of such an overwhelming majority of the members that those who dissent are of no importance whatsoever': Lauterpacht, *Oppenheim's International Law* (above, n. 14) vol. 1, pp. 16-17.

⁹⁵ James L. Brierly found Suarez's conception of the international society, which was to a large extent dependent on Vitoria, still to be of relevance: *The Basis of Obligation in International Law* (2nd edn., Oxford, 1958) pp. 366-75.

⁹⁶ Vitoria, *De potestate civili*, 2 (above, n. 59) pp. 30-2.

⁹⁷ Resolution 687 of the United Nations Security Council is indeed similar to the 1919 Versailles Peace Treaty and the 1947 Paris Treaties in as far as they all hold the losing belligerent solely responsible for the war and, by consequence, demand damages to be paid. See for the debate on the significance of Res. 687: Christine Gray, 'After the Ceasefire: Iraq, the Security Council and the Use of Force', this *Year Book* 65 (1994) pp. 135-74; Sharon Korman, *The Right of Conquest. The Acquisition of Territory by Force in International Law and Practice* (Oxford, 1996) esp. pp. 300-1.

through the works of some of Vitoria's students and their students that his thought lived on, before it was reclaimed at the end of the nineteenth century. So it is impossible to speak of a Vitorian tradition going back beyond the late nineteenth century. Second, Vitoria did not expound his ideas systematically in the way Grotius did. Nevertheless, the outlines of his thought can be discerned sufficiently to establish the similarity with Lauterpacht's and Bull's Grotian tradition or conception.

Why then take the Grotian tradition back beyond Grotius and reach as far as Vitoria—in so far as doctrine is concerned—and the collapse of the *respublica christiana*—in as much as practice is concerned? The answer is that it questions our traditional historical perspective on the paradigm shift of the twentieth century. From this 'Vitorian' perspective, the revolution of international law in the previous century seems to have accomplished to a large extent an ideal of international society and law that had already been 'prophesied' by the Black Friar of Salamanca. Through his writings Vitoria had sought a solution to the challenge presented by the collapse of the *respublica christiana*—or, in his case, its irrelevance in relation to the New World—so far as the European legal order was concerned. He constructed a vision which would restore an integrated society of 'States' that were relatively sovereign. The thesis that the modern law of nations was an answer to the crisis and chaos of the European legal order of the later sixteenth and early seventeenth centuries stresses the continuity in the evolution ever since. At the beginning of the twenty-first century, mankind seems to have come full circle. The anarchy, which was at its deepest between 1540 and 1648, is overcome for the most part. The challenge of the claims to absolute sovereignty has been met and, after five hundred years, we are back at an international society that combines an autonomous law-making power vested in an international society with a relative concept of sovereignty. These outlines are not very different from the most productive alternative which the early sixteenth century brought forward to replace the *respublica christiana*. And sovereignty, as a relative concept, might prove—since it seems to be historically compatible with a true international society—more resistant to the changes in international law than many prefer to think. It is another reason to reject the positivistic idea of the followers of John Austin, that international law will only become real law through the formation of a true world government.⁹⁸

⁹⁸ On the importance of Austin for nineteenth-century doctrine see Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', *Harvard International LJ*, 40 (1999) pp. 13–18.