International law and its history

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INTERNATIONAL LAW AND ITS HISTORY: THE STORY OF AN UNREQUITED LOVE

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1. International Law and Its History

In a paper presented at the Royal Academy of Sciences of the Netherlands in 1953, the great Dutch historian of international law Johan Hendrik Willem Verzijl (Utrecht University) remarked that 'the historiography of the law of nations is still in a very unsatisfactory state'.[1] Verzijl did not feel this statement needed qualification when he published the same paper in the first volume of his monumental *International Law in Historical Perspective* fifteen years later.[2] The leading historian of international law from Germany of those days, Wolfgang Preiser, would certainly not have contradicted him. He too stated that the historical research into the law of nations was still underdeveloped. The history of the law of nations was, he said, the youngest branch of legal history.[3] Another German, Wilhelm Grewe, had it repeated as late as the year 2000 that 'this task [the history of the modern international law] has been severely neglected in the study of international law up to the present day'.[4]

These complaints by three leading international legal historians of the second half of the 20th century were not uttered without cause. The history of international law has been and still is a minor field in terms of academic interest. Until a decade ago, at no time since Robert Ward made the first attempt at writing a survey of the history of the law of nations in 1795[5] have there been more than a small number of scholars who regularly published on the subject and could make the claim of being specialists.

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1 Published in the Academy's *Mededelingen, Letterkunde,* NS 16-2 (1953).

2 Verzijl, 'Research into the History of the Law of Nations', in J.H.W. Verzijl, *International Law in Historical Perspective*, vol. I (1968) 400.

3 W. Preiser, *Die Völkerrechtsgeschichte. Ihre Aufgaben und Methoden* (1964) 5.

4 W. Grewe, *The Epochs of International Law* (trans. Michael Byers, 2000) 1, translated from the German *Epochen der Völkerrechtsgeschichte* (1984) 19. The book was first published in 1944.

5 R. Ward, *An Enquiry into the Foundation and the History of the Law of Nations of Europe* (1795).

However, during the last decade, the interest in the history of international law has suddenly risen.[6] Never before have so many scholars been publishing or lecturing on the history of international law as today.[7] For the very first time, cautious attempts at a more coordinated and systematic study of the subject are made. The Max Planck Institute for European Legal History in Frankfurt initiated a project entitled 'The History of Academic Trends and Ideas in International Law from the *Kaiserreich* to National Socialism', in which some fifteen, mostly young, scholars participated.[8] At the Tilburg Law Faculty in the Netherlands, a group of scholars is working in the field.[9] In 1999, Professor R. St. J. Macdonald from Dalhousie University, Halifax (Canada) founded the *Journal of the History of International Law*, which is now continued by the Max Planck Institute for European Legal History and its counterpart for International Law at Heidelberg.[10] Apart from Nomos Verlag which publishes the books emerging from the Frankfurt project, other major academic publishers have regularly and increasingly printed books on the history of international law over the last years.[11] The first international conferences were also organised.[12]

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[6] For a survey of recent developments: Hueck, 'The Discipline of the History of International Law', 3 *Journal of the History of International Law* (2001) 194.

[7] Today, courses in the History (and Theory) of International Law are taught, among others at the law faculties of New York University, Cambridge, Helsinki, Leyden, Rotterdam, Utrecht and Tilburg Universities. Most international legal historians are to be found in the United States, Canada, Britain, the Netherlands, Germany and Japan.

[8] The individual books resulting from this project are published by Nomos Verlag in the series 'Studien zur Geschichte des Völkerrechts'.

[9] By Autumn 2005 there were nine researchers working in this field. The research is done in the context of a subprogram of the Faculty's Centre for Transboundary Legal Developments, entitled 'The Westphalian Myth Revisited: State Sovereignty and the Process of International Law-Making and Law-Enforcement from the 16th Century to the Present'.

[10] First published by Kluwer Law International, and from 2003 (2nd issue) onwards by Brill/Martinus Nijhoff Publishers.

[11] E.g. Cambridge University Press: A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005); D. Bederman, *International Law in Antiquity* (2001); R. Lesaffer (ed.), *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (2004); M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001); G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Law* (2004). Oxford University Press: H. Bull, B. Kingsbury & A. Roberts (eds.), *Hugo Grotius and International Relations* (1990); Y. Onuma (ed.), *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (1993); R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (1999). Martinus Nijhoff: S. Beaulac, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (2004).

[12] In addition to the conference 'Time, History and International Law' the papers of which are published in this volume, there were, e.g., the conference 'Peace Treaties and International Law in European History' at Tilburg University in March 2001 and the conference 'Sovereignty and the Law of Nations (16th–18th centuries) organised by the Royal Flemish Academy of Belgium for Science and the Arts in Brussels, April 2002. The *Deutsche Rechtshistoriker Tag* of 2004, organised by Mathias Schmoeckel in Bonn, included a session on 'Völkerrechtsgeschichte' convened by Karl-Heinz Ziegler, which was a first at such a national legal history conference. In September 2005 Heinhard Steiger hosted an important conference on the history of international law in Gießen.

This sudden boom in the historiography of international law is easily explained. Though the interest has never been so great, there have been periods in the past in which scholars, particularly international lawyers, suddenly showed an interest in the field. It is no coincidence that the first attempt at writing a history of international law dates from the Revolutionary Era (1795). In the years following both World Wars, there was a notable rise in activity as well. Now, some fifteen years after the Cold War and in these uncertain days of the 'War on Terror' international society is in turmoil and experiences major changes once again. It is this which causes scholars to turn from the more daily scholarly business of analysing and explaining existing international law and urges them to question the fundamentals of international law. The historical discourse is part of that 'enquiry into the foundations of the law of nations'.

One thing in all this is very striking, at least to a legal historian from continental Europe. The historiography of international law is an interdisciplinary subject with two natural constituencies: international lawyers and legal historians.[13] Today, as in the past, most specialists in the history of international law are primarily international lawyers, not legal historians. Whereas in most fields of the law, it is the legal historian who complains about the lack of interest of colleagues from current law, in the field of international law, the world is turned on its head.

There are two sides to this coin. First, international lawyers tend to have greater interest in the history of their field than municipal lawyers have – at least municipal lawyers from civil law countries. Second, legal historians have surprisingly little interest in the history of international law. The particular interest of international lawyers is easy to explain. Customary law plays a much larger part in international law than in most municipal law systems. The same goes for case law outside the world of the common law. This forces international lawyers to delve into the past. Furthermore, as was stated above, at a time of transition as we are in now, international lawyers tend to turn to history in order to get a grasp of current evolutions. On the whole, the interest displayed by international lawyers in their history is functional and is dictated by current needs. It is rarely born out of curiosity about the past itself.

The story of international law and its history can be read as a love story, albeit a sad one. Klio, the muse of history, desperately wants to marry into the house of Themis. Of all the sons of Themis, it is her youngest one who covets Klio the most. But in the eyes of Klio, he is the least eligible of all and she constantly pushes him away. Why is that, and what can be done to give this story a happy ending?

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[13] Apart from these two categories, diplomatic historians and International Relations theorists have also made important contributions to the history of international law.

2. *The Story of an Unrequited Love*

Why is it that Klio turns down Themis's youngest son, International Law? There are three reasons.

A. An Unattractive Suitor

First, because he is not considered a good match. There is certainly a psychological and corporative dimension to the legal historian's reluctance to specialise in the history of international law. At least during the last fifty years, most legal historians have seen the relative position of their field – above all, of Roman law – decline within their law schools. It comes as no surprise, therefore, that legal historians sometimes – in their very worst moments, of course – exhibit the characteristics of an endangered species. In many European universities, recent ongoing reforms introducing Bachelors and Masters degrees have caused legal historians to dread another reduction in the credits devoted to legal history. And while, these fears have been realised in some cases, the international corps of professional legal historians tends – after years of continuous onslaught – to underscore and highlight the losses and forget about the, surprising, gains. In addition to being a self-defeating tactic, this betrays a defensive frame of mind.

Over the years, a considerable number of legal historians have tried to break out of the marginal position they felt they were in, by stressing that above all else, they are lawyers too. Regardless of the merits thereof, the concern with presenting credentials as 'real lawyers' helps to explain why legal historians do not easily turn their attention to what is still felt to be the least 'legal' of all branches of the legal profession and studies. Although the heyday of the sovereign state and of legal positivism that went along with it was in the 19th century and has now long since past, for many municipal lawyers international law still suffers from the stain the sceptics of international law of that century left it with. As most international lawyers have experienced, any breach of international law by a leading power tempts scholars from municipal law to do away with international law as 'political propaganda' or 'loose talk about ideals'. Choosing to study international law is hardly a clever option for the legal historian who wants to move from the margins to the centre of his law school. It comes thus as no surprise that international legal history has a strong place in law schools where international law is held in high regard. This is equally true for law schools where the field is worked by international lawyers – such as New York University and Cambridge – as where it is worked by legal historians – such as Utrecht and Tilburg.

In addition to this corporative reflex, there is another problem with international law that turns away legal historians. For a long time, historiography has suffered under the modern identification – again stemming from the 19th century – of the law of nations with the sovereign state. Thus, the scope of the field has been greatly

reduced. The law of nations, so it is traditionally held, only emerged after the sovereign state came into being. Therefore, its history cannot go back beyond the beginnings of the sovereign state. Also, as the sovereign state and the international legal system based on it was a European invention, the relevant history of international law is – at least before the 19th century – a strictly European history.

Until the end of 19th century, it was held that the modern – or 'classical' as it, paradoxically, is also called – law of nations only emerged in the 17th century.[14] The Peace Treaties of Westphalia (1648) were commonly quoted as having laid down the foundations of the modern states system and its law.[15] The Dutch humanist Hugo Grotius (1583–1645), whose *De iure belli ac pacis libri tres* first appeared in Paris in 1625, was said to be the father of the modern doctrine and science of the law of nations.[16] In the decades before and after 1900, some scholars re-evaluated the role of the 16th-century writers on the law of nations such as the Spanish neo-scholastics Francisco de Vitoria (c. 1480–1546) and Francisco Suarez (1648–1617) or the Roman lawyer Albericus Gentilis (1552–1608).[17] Under the sway of the more general revaluation of the Late Middle Ages – the Renaissance of the Twelfth Century[18] – some students of international legal history moved further back the origins of the modern states system to that era. Wolfgang Preiser proposed 1300 as the starting point for the system of a modern law of nations in Europe.[19]

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[14] By 'modern law of nations', I mean the law of nations that started to emerge in the 16th century, was elaborated in the decades after 1648 and endured until the end of the First World War. On this terminological confusion, see Grewe, 'Was ist klassisches, was ist modernes Völkerrecht?', in A. Böhm, K. Ludersen & K.-H. Ziegler (eds.), *Idee und Realität des Rechts in der Entwicklung der internationaler Beziehungen. Festschrift für Wolfgang Preiser* (1983) 111.

[15] See for examples: Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law', 73 *British Yearbook of International Law* (2002) 104, footnote 3.

[16] Bourquin, 'Grotius est-il le père du droit des gens', in *Grandes figures et grandes œuvres juridiques* (1948) 77–99, and more recently, Ziegler, 'Hugo Grotius als Vater des Völkerrechts', in P. Selmer and I. von Münch (eds.), *Gedächtnißschrift für Wolfgang Martens* (1987) 851; *idem*, 'Die Bedeutung von Hugo Grotius als Vater des Völkerrechts – Versuch einer Bilanz am Ende des 20. Jahrhunderts', 13 *Zeitschrift für historische Forschung* (1996) 354. Grotius' title as the father of international law has been disputed by e.g. Grewe, 'Hugo Grotius – Vater des Völkerrechts', 23 *Der Staat* (1984) 161 and P. Haggenmacher, *Grotius et la doctrine de la guerre juste* (1983) 622. See also *idem*, 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture', in H. Bull, B. Kingsbury & A. Roberts (eds.), *Hugo Grotius and International Relations* (1992) 133.

[17] Kohler, 'Die spanische Naturrechtslehrer des 16. und 17. Jahrhunderts', 10 *Archiv für Rechts- und Wirschaftsphilosophie*, (1916/1917) 235; E. Nys, *Le droit de la guerre et les précurseurs de Grotius* (1882); J. Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (1934); C. von Kaltenborn, *Die Vorläufer des Hugo Grotius auf dem Gebiete des Jus Naturae et Gentium* (1848); T.A. Walker, *A History of the Law of Nations* vol. 1 (1899). On Scott's role in the 'rediscovery' of Vitoria and Suarez see C. R. Rossi, *Broken Chain of Being James Brown Scott and the Origins of Modern International Law* (1998).

[18] C.H. Haskins, *The Renaissance of the Twelfth Century* (1927).

[19] Preiser, 'Über die Ursprunge des modernen Völkerrechts', in E. Bruel (ed.), *Internationalrechtliche und staatsrechtliche Abhandlungen. Festschrift für Walter Schatzel zum 70. Geburtstag* (1960) 373. For more references, see Lesaffer, 'Grotian Tradition', *supra* note 15, footnote 105, note 6.

But however far back one places the origins of the modern, European law of nations, the association of the law of nations with the modern sovereign state still reduces the historiography of the law of nations in time and space. Wolfgang Preiser and his student Karl-Heinz Ziegler, both specialists in the Roman 'international law', escaped that reduction, but felt obliged to stress the continuities between international legal ideas and practices from Antiquity to European modernity.[20] Today, scholars who claim that 'international law' in Antiquity may be studied for its own sake without making the case of continuity remain a rarity.[21]

The debate about the origins of the modern, European law of nations (1500/1648–1919) is not the real debate about the history of international law and its outcome should not determine the scope of the field. The modern law of nations in its relation to the sovereign state should not define 'international law' in its historical setting. 'International law' as a historical concept should be defined as the law regulating the relations between political entities that do not recognise a higher authority. It is what Heinhard Steiger recently called the 'law between political powers'.[22] As such, international law is of all times and places and deserves to be the subject of historical enquiry, regardless of its relations to the modern law of nations and to current international law. It is only natural that current international lawyers who turn to history will primarily devote their time to those parts of the history that are most directly relevant to them. One cannot upbraid them for having neglected the other epochs. The fault lies with the legal historians who have systematically ignored the international legal systems of 'their' eras.

B. A Demanding Lover

Second, International Law is a demanding lover. As Verzijl already suggested in his 1953 paper, international legal historiography suffers from an abundance of sources.[23]

Traditionally, historians of international law have devoted a disproportionate amount of attention to doctrine to the detriment of international legal practice. The most obvious explanation for this is surely practical. The study of international legal practice is a huge undertaking. *Primo*, there is the abundance and the disparity of legal source material. Apart from the obvious 'international' sources such as treaties, declarations of war and decisions by international tribunals and arbitrators, there are many municipal law sources to be considered. This is even more important for those

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[20] Preiser, *ibid*; K.-H. Zeigler, *Völkerrechtsgeschichte. Ein Studienbuch* (1994) 1–2.

[21] D. Bederman, *International Law in Antiquity* (2001) 6; A. Watson, *International Law in Archaic Rome: War and Religion* (1993).

[22] Steiger, 'From the International Law of Christianity to the International Law of the World Citizen – Reflections on the Formation of the Epochs of the History of International Law', 3 *Journal of the History of International Law* (2001) 181.

[23] Verzijl, *supra* note 2, 407–16.

eras where there was no strict distinction between the national and the international sphere, such as the Middle Ages or the 16th and 17th centuries. These municipal sources include legislation and the decisions of the most diverse courts of law. An example of what this may imply can be taken from peace treaty practice. Since the Late Middle Ages, peace treaties often contained stipulations about the restitution of private property. While these normally provided for special bodies to deal with the disputes arising out of these clauses, at times the regular courts judged these matters. To get a clear view of the execution of a peace treaty in any given border area, one should therefore browse through the archives of all the competent courts of the region, down to the lowest level. Such an exercise concerning one single treaty in one region might prove too onerous for one doctoral thesis. It should also be mentioned that for most eras in history the distinction between private and public law will not be helpful, because it either did not exist at the time or had little practical value. Statutes and cases from private law may therefore not be automatically disregarded because they address matters which in our view pertain to individual rights and obligations. Before the modern state became truly sovereign in the 18th century, the individual was not excluded from the international legal scenery to the same extent that he was afterwards. *Secundo*, studying historical international practice is a multidisciplinary endeavour. In view of the underdevelopment of international legal history as a field, the scholar regularly needs to turn to International Relations Theory to get a grasp of his field. More importantly, if one wants to take the context of the legal practices one studies into account, one needs to take diplomatic history on board. The reasons behind a certain clause in a treaty or a certain justification for a war are almost always at least partly of a political or diplomatic nature. This in itself multiplies the sources international legal historians will have to deal with. Next to the strictly legal sources, diplomatic and political sources such as diplomatic instructions and correspondence, the reports of political debates in governmental councils and parliamentary assemblies as well as private letters will in many cases have to be perused by the international legal historian. These will not only provide contextual, political information but may also yield direct evidence concerning legal questions.

C. A Negligent Husband

Third, Klio fears that she will not be taken seriously. As was mentioned above, international lawyers show greater interest in historical discourse than municipal lawyers do, at least municipal lawyers from civil law countries. However, for most international lawyers their relation to history is a purely functional one. They look at history because they need it to better understand current issues and trends.

As a discipline, the history of international law has suffered from this pragmatic interest. This may not seem an honest statement to those scholars – international lawyers and legal historians alike – who devoted or devote much time and energy to the study of the subject. But these few dozens of historians of international law

of past and present have not been able to sufficiently occupy the battleground as to mould the popular view of the history of international law to their liking. Today, as in the past, the popular view among international lawyers is still to a large extent based on broad and vague assumptions that rather bear witness to present-day concerns than to historical reality. If one wants to know what international lawyers in general know and think about the history of their field, it would serve more to browse through the historical introductions to general textbooks of international law or read the frequent historical reminiscences in international law books than to read the general surveys of its history like those of Nussbaum, Grewe or Ziegler.[24] For lack of an established methodology and theoretical frameworks for the study of the history of international law, International Relations Theory and its historical discourse traditionally take a place of honour in the 'popular' debate about the history of international law, sometimes for better, mostly for worse. International Relations theorists often treat historical facts in a most selective way, being on the outlook for those events and facts that corroborate their theses.[25] But one should not too easily upbraid International Relations theorists for the negative fall-out this has on international legal history, but reprove those who used their 'historical analysis' for what it was not meant to be: a comprehensive analysis and description of historical reality.

Much of what is generally accepted among international lawyers is the fruit of evolutional history. While there is no problem with evolutional history in itself, the problem is that it often concerns 'evolutional history of the worst kind'. It is history to which the famous dictum by T.S. Eliot 'the end is where we start from' would apply. With this kind of historiography, the researcher tries to find the historical origins of a present-day phenomenon by tracing back its genealogy. A prime illustration of this genealogical concern with history is what can be called the famous yet infamous 'first timers'. Thus, the trial of 1474 against Peter von Hagenbach has been cited as the very first conviction for a war crime before an international tribunal.[26] The aim is clearly not to understand what happened in 1474, but to give current ideas or practices roots in the distant past. This kind of historiography sins against the most basic rules of historical methodology, and the results are deplorable. This genealogic history from present to past leads to anachronistic interpretations of historical phenomena, clouds historical realities that bear no fruit in our own times and gives no information about the historical context of the phenomenon one claims to recognise. It describes history in terms of similarities

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[24] W. Grewe, *Epochs of International Law*, *supra* note 4; A. Nussbaum, *A Concise History of the Law of Nations* (1954); K.-H. Ziegler, *Völkerrechtsgeschichte, supra* note 20.

[25] Osiander, 'Talking Peace: Social Science, Peace Negotiations and the Structure of Politics', in R Lesaffer (ed), *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (2004) 290–300.

[26] G. Schwarzenberger, *International Law*, vol. 2, (1968).

with or differences from the present, and not in terms of what it was. It tries to understand the past for what it brought about and not for what it meant to the people living it. The cavalier way in which history is often dealt with is best of all illustrated by the fact that first-time claims are often rooted in no more than the researcher making the claim has not (or not yet) taken the trouble of considering a more remote period.[27]

However, students of the history of international law, and particularly professional legal historians, should not gloat over the 'amateurism' of international lawyers. If things are as they stand, it is primarily because the 'professional' legal historians have disdained to plough the field. Furthermore, many of the weakly founded generalisations of the history of international law have gone unchallenged by the specialists or have been adopted and confirmed without much serious, systematic and methodological research. Also, the evolutional streak has thrown its shadow over the discourse of specialists. The debate about the origins of the modern law of nations illustrates this point. The almost automatic and evident association of history and theory of international law, which is mostly an Anglo-American phenomenon, is another indication of the ancillary function of history to international lawyers. To many, history is not a self-standing concern. The past is only the mine where facts and figures are to be found to sustain and corroborate existing theories. While many scholars take history seriously when they try to prove their theories, others do not hesitate to force history by means of a Prokrustes-rotation into the box of their theory.

3. *Brokering the Relation*

The efforts of a few dozen true historians of international law of the past and the present notwithstanding, the history of international law remains underdeveloped. First, traditionally the stress is on the analysis of historical doctrine while state practice largely remains in the shadows. In this respect, little has changed since Preiser stated this complaint in 1964.[28] Second, leaving apart some exceptions, the historiography is largely limited in time and space to Europe and the West from the 16th or even 17th century onwards. Third, the history of this 'modern law of nations' is one-sidedly interpreted in terms of the emergence and rise of the sovereign state. In this sense, it is still dominated by the concerns of the early pioneers of the history

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[27] Verzijl, *supra* note 2, 415. If one makes the claim about Von Hagenbach, one might as well refer to the role of heralds in upholding the code of chivalry in the Middle Ages. M.H. Keen, *The Laws of War in the Late Middle Ages* (1965) 23–44; T. Meron, *Henry's War and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages* (1993) 172–90.

[28] W. Preiser, *Völkerrechtsgeschichte, supra* note 3, 16–7. See also Steiger, 'Probleme der Völkerrechtsgeschichte', 26 *Der Staat* (1987) 103.

of international law from the heyday of the sovereign state, the 19th century. Everything that corroborated the 'Hobbesian' or 'Westphalian' interpretation of the law of nations since 1648 is placed in the spotlight and called fundamental to the system; everything that detracts from it is pushed into the shadows and rejected as exceptional. The 'revolution of international law' in the 20th century and the gradual decline of the sovereign state's dominance have done nothing to correct that view of the modern law of nations in the period between Westphalia and Versailles (1648–1919). On the contrary, underscoring the 'Westphalian' character of the period before 1919 enhances the significance of the changes afterwards.[29] It is only in the last decade or so that authors have started to nuance and fine-tune these views of the modern law of nations. The role played by natural law with the great 'positivists' of the 18th century, such as Cornelius van Bynkershoek (1673–1743) and Emer de Vattel (1714–1767) was rediscovered.[30] And outside the borders of a European international system where the Hobbesian order ruled supreme, a living Grotian system was resurrected in the relations between Europe and the outer-European world.[31] Also, the not so Hobbesian or Westphalian features of the 'Westphalian' system are currently being restated.[32] While I subscribe to these more nuanced views, I have to admit that they go remarkably well with the present-day discourse on the demise of the sovereign state, global governance and international protection of individual rights.

A. State Practice

What should be done to develop the field? First, in the historical research and discourse a balance should be struck between doctrine and legal practices. Often international legal historians consider doctrine to be convenient shorthand for what the law of nations of a certain period was. They act as if the writings of the 'classics of international law' offer a reliable or even authoritative statement of the then applicable law. They thus reduce the law of nations to what some influential authors said it was. Thereby, they tend to forget that these authors may have been more influential decades after their death and not so much during their lives. Furthermore, they all too readily overlook that many of the classics of international law – at least until

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29 Lesaffer, 'Grotian Tradition', *supra* note 15, 103–10.

30 K. Akashi, *Cornelius van Bynkershoek: His Role in the History of International Law* (1998); E. Jouannet, *Emer de Vattel et l'émergence doctrine du droit internationale classique* (1998).

31 In this system the 'state' was not the sole subject or author of the law of nations. Individuals or non-state entities held and created rights. Natural law and natural rights played a significant role. A. Anghie, *supra* note 11; E. Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (2002); R. Tuck, *supra* note 11.

32 S. Beaulac, *supra* note 11; R. Lesaffer, 'Grotian Tradition', *supra* note 15; B. Simpson, *supra* note 11.

deep in the eighteenth century – did not aspire at describing the law as it stood, but to outline an ideal, or at least a better system of the law of nations.[33]

In most eras of history, 'state' practices and customary law constituted a more important source for the law of nations than doctrine. In fact, it was only in the Late Middle Ages that something approaching an authoritative *communis opinio* in doctrine about some major issues of the law of nations came about. This doctrine of the *ius gentium* was part of the scholastic discourse of the later-medieval theologians, as well as Roman and canon lawyers of the *ius commune*. At the beginning of the 16th century, the Reformation shattered consensus on existing doctrinal rules and doctrine lost its authority.[34]

Therefore, international legal historians should delve deeper into state practice. There are two reasons why this has not been done. *Primo*, as was expounded above, this is a most tedious undertaking. *Secundo*, here too, the obsession with the sovereign state is at fault. After all, sovereignty is the ultimate shrinker of the law of nations. According to the most extreme Hobbesian interpretations of the Westphalian law of nations, there is little law of nations worth studying in the era of the modern law of nations. The thousands of treaties of the modern era should not be taken too seriously as sources of legal obligations, let alone as sources of law, because under the doctrine of *clausula rebus sic stantibus* sovereigns can always push them aside. The many hundreds of manifestos offering justifications of war are not worth a minute of the international legal historian's attention. What else can they be than mere propaganda at a time when the *ius ad bellum* was just that: an unlimited right of sovereigns to wage war whenever they saw fit? Therefore, their contents must have been as political as their purpose. Questions about the rights of individuals should not be addressed either, as the doctrine of dualism safely excludes the individual from the international legal sphere.

B. Taking History Seriously

Second, whatever the intentions and purposes of the scholar studying the history of international law, he should approach the past with proper respect. This means that he should make use of the basic rules of historical methodology. In itself, there is nothing wrong with the desire to learn something useful for the present from the past, nor with evolutional history. But before one can learn something from the past other than what one knows from the present, one first has to let the past be the past – at least as far as this is humanly possible. This means that one should work

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[33] This claim has recently also been made to some extent for some of the great 'positivists' of the eighteenth century like Bynkershoek and Vattel, see *supra* note 30. In this context, see also A. Perreau-Saussine's chapter on Oppenheim in this volume.

[34] Lesaffer, 'Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription', 16 *European Journal of International Law* (2005) 34–8.

in two distinct phases. First, there is the analysis of history in its own right and on its own terms. Second, the historical data can be used in a wider framework, like a long-term evolution.

In this first phase, the rudiments of classical historical methodology should be respected. This comes down to nothing more or less to what historians have been doing since the days of humanistic scholarship: the textual and contextual analysis of their written sources. Historians should see to it that their sources are as authentic as possible. They should try to read them as the contemporaries of the authors would. And they should relate them to the contexts and the concerns of the authors.

This is easier said than done. Even today, there are hardly any trustworthy critical editions of even the main historical sources of international law, be it from doctrine or from practice.[35] Even the most frequently cited and used treaties have hardly been edited in a critical way.[36] Textual analysis often entails linguistic and philological skills. But it is in the contextual analysis that the greatest mistakes are made, although they are easiest to avoid. It is often, again, the concern with evolutional history that is at fault. Texts, and especially the writings of the great authors of international law are not read for what they said but for the significance they had for the further development of international law. They are read with knowledge of their future. One does not try to understand what the author wrote, but how he contributed to later developments. The enormous literature modern scholarship has produced on, for instance, Grotius's *De iure belli ac pacis* illustrates the point. As Grotius is considered the *fons originis* of the modern law of nations and its doctrine, his work is usually read with the concern of finding the roots of the later law. What one should do is try to understand why Grotius took a particular position[37] and consider what stand he took in relation to older authors and doctrines.[38] Grotius, like most other authors in history, entered into an ongoing debate. While he and other classical authors are often treated by current scholarship as if they dialogued with later authors, they dialogued with older authors. Here again, the history of international law bites its own tail. Traditional historiography has been so concerned with the debate about the origins of the modern law of nations and the modern states system that it has fallen into the trap of considering its father(s) – Grotius and his immediate predecessors – or its birth certificates – the Peace Treaties of Westphalia – as the original creators or creations.

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35 Steiger, 'Quellenkunde und Quellenedition für die Völkerrechtsgeschichte', 28 *Der Staat* (1989) 576–91; *idem,* 'Entwicklung des Völkerrechts von 1815 bis 1945 im Spiegel seiner Quellen', 34 *Der Staat* (1995) 130–9.

36 One must do with either the uncritical publication of C. Parry (ed.), *The Consolidated Treaty Series* (1969–1981) as regards treaties since 1648 or with much older collections such as most famously Jean Du Mont, *Corps universel diplomatique du droit des gens* (Amsterdam, 1726). Currently, the Institute for European History, department of Universal History in Mainz is publishing early-modern peace treaties on the web. These editions are not critical: www.ieg-friedensvertraege.de.

37 As one by Tuck, *supra* note 11, 78–108.

38 As done by P. Haggenmacher, *Grotius et la doctrine de la guerre juste* (1983).

This may all seem evident, trivial and trite, but these are is not superfluous remarks to make. It never ceases to amaze how little this all is heeded in the historiography of the law of nations. One example will suffice to make this point. Probably the most widespread and repeated idea in the history of international law is the 'Westphalian myth'. Actually, it goes beyond the field and has become an idea shared with political and diplomatic historians, constitutional lawyers and international relations specialists.

The Westphalian myth holds that the Peace Treaties of Westphalia of 1648 laid the foundations for the sovereign states system and constitute the formative acts of the law of nations that went along with it. It has been claimed and repeated that the main features and principles of that system were introduced into the law of nations at Westphalia. These claims are made concerning sovereignty, religious equality, the constitution of Europe as an international legal society and the balance of power. They are so well spread that hardly anybody takes the trouble to check these claims or is likely to dispute them.[39]

However, in the context of the academic activities on the occasion of the 350th anniversary of the treaties in 1998 some scholars from very different backgrounds did just that. However surprising this will be to the reader who did not himself peruse the treaties, none of the above claims proved to have a foothold in the texts of the treaties themselves. There is no reference to either sovereignty, religious equality or the balance of power as principles of international law or relations, and the treaties do nothing to constitute a European legal order. And in as much as it contains concepts that may explain why historians have read into treaties what they did, these are anything but innovative, merely restatements of past principles, if not retrogressions into history.[40] Once again, the 'originality' of Westphalia seems to be

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[39] See *supra* note 15.

[40] On the Westphalian myth and the challenge thereof: Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?', 2 *Journal of the History of International Law* (2000) 148; also *idem*, *supra* note 11, 71–97; Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty', 21 *International History Review* (1999) 569; Eyffinger, 'Europe in the Balance: An Appraisal of the Westphalian System', 45 *Netherlands International Law Review* (1998) 161; Haggenmacher, 'La paix dans le pensée de Grotius', in L. Bély (ed.), *L'Europe des traités de Westphalie. Esprit de diplomatie et diplomatie de l'esprit* (2000) esp. 68–9; Lesaffer, 'The Westphalian Peace Treaties and the Development of the Tradition of Great European Peace Settlements prior to 1648', 18 *Grotiana* (1997) 71; Osiander, 'Sovereignty, International Relations and the Westphalian Myth', 55 *International Organization,* (2001) 251; Schröder, 'Der Westfälische Friede – eine Epochengrenze in der Völkerrechtsentwicklung?', in M. Schröder (ed.), *350 Jahre Westfälischer Friede. Verfassungsgeschichte Staatskirchenrecht,Völkerrechtsgeschichte*, Schriften zur europäischen Rechts-und Verfassungsgeschichte (1999) vol. 30, 119; Steiger, 'Der Westfälischen Frieden – Grundgesetz für Europa?', in H. Duchhardt (ed), *Der Westfälische Friede. Diplomatie, politische Zäsur, kulturelles Umfeld, Rezeptionsgeschichte* (1998) 33; K.-H. Ziegler, 'Die Bedeutung des Westfälischen Friedens von 1648 für das europäische Völkerrecht', 37 *Archiv des Völkerrechts* (1999) 129; *idem*, 'Der Westfälischen Frieden von 1648 in der Geschichte des Völkerrechts', in M. Schröder (ed.), *350 Jahre Westfälischer Friede*, 99.

vested in little more than that nobody ever took the trouble to compare the treaties with earlier treaties; everybody laid them besides more recent texts. And even now that the myth has been disproved, it is restated again and again.

All this does not imply that history can or may not be used in a wider discourse on current international law. However, as it was stated above, this can only be done in a second movement. Evolutional history is commendable, as long as the distinct phases of these evolutions are first studied in their own right and for their own sake. Only after having done that will it be possible to construct an evolutional theory that truly moves from past to present and to ensure that explanations are derived from the past and not dictated by the present. A similar, two-phased methodology has to be used for comparative history.

C. A Less Selective Approach

Third, international legal historians should extend their concerns with history beyond the spatial and temporal limits traditionally set to the sovereign state system and its law of nations. This is a double plea. *Primo*, it is a plea to study the international legal systems outside Europe and far beyond the 16th century. *Secundo*, it is also a plea for the historians of the modern, European law of nations to broaden their scope. This means that they should place that modern law of nations into its wider historical context and stop considering it as a highly exceptional *creatio ex nihilo* by the 'intellectual giants' of the early 17th or even 16th century. The precursors of Grotius and Westphalia need to be studied seriously if we are ever to understand the formation of this law of nations. It is impossible to comprehend Grotius without being aware of the intellectual tradition in which he stood. And whereas quite some attention has been devoted to his immediate inspirers such as the Spanish neo-scholastics or Balthasar de Ayala (1548–1584) and Albericus Gentilis (1552–1608), his main source of inspiration remains a blank spot on the historical map. I refer to the great tradition of medieval Roman and canon law, which has developed many important ideas on the law of nations.[41] And the concerns of the negotiators of Westphalia can never be correctly assessed if the upheaval brought about to the international legal system by the Reformation and the Discoveries is not correctly understood. Placing the modern law of nations into its wider context also presupposes more attention for the relations between Europe and the outer-European

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[41] See, however, the chapters by K.-H. Ziegler, A. Wijffels, D. Bauer & L. Winkel in R. Lesaffer (ed.), *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One* (2004). Also Muldoon, 'The Contribution of the Medieval Canon Lawyers to the Formation of International Law', 28 *Traditio* (1972) 483; *idem*, 'Medieval Canon Law and the Formation of International Law', 81 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, kanonistische Abteilung* (1995) 64.

world. Over the last few years, several scholars have started on this road.[42] Apart from these temporal and spatial borders that need to be crossed, there is also a material one. International legal history is considered to be part of the history of public law. It is therefore of no interest to the vast majority of legal historians who work on private law. However, this too is a misconception. Historically, international law only became a distinct field of law, and thus of public law, far into the 17th century. And even then, as Sir Hersch Lauterpacht (1897–1960) brilliantly argued, it went on to take most of its inspiration from private law.[43]

D. International Legal History As a True Academic Discipline

Fourth, and probably most importantly, international legal history should be organised as a field and as a discipline. For the first time in history, today more than a handful of scholars regularly publish on the history of international law. However, their endeavours remain largely isolated and uncoordinated. This problem is enhanced by the fact that the field includes scholars from different constituencies, which in itself is a good thing. However, at times it is rather shocking to notice that scholars from one field, who propose certain ideas, are completely unaware of the fact that others from another field – even if they published in the same language and with major publishing houses – stated the same. Therefore, all kinds of initiatives that bring together scholars from these different backgrounds are laudable.

The need for coordination is great, not only because the field is wide but also because the field presupposes an interdisciplinary approach. Apart from international lawyers and legal historians, who are focused upon in this contribution, diplomatic historians and international relations specialists have a role to play. However, a first step would be for many international lawyers who work the field of history to lure more legal historians into working with them. After all, it is the legal historians who may be expected to do the groundwork, the work of the 'first phase'.

Legal historians often complain about their current law colleagues not having enough interest in or appreciation for historical discourse. It is ironic that the one field of current law in which the demand for historical research is the greatest is the most spurned by legal historians. They are wrong to do so, but will need to be convinced step by step. Therefore, legal history and international law need to break from their respective cocoons and reach out to and get acquainted with one another. To return to our metaphor of love: 'let them date'.

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[42] *Supra* note 31.
[43] H. Lauterpacht, *Private Sources and Analogies of International Law* (1927).