INTRODUCTION: TAMING THE LEVIATHAN

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Back in 1964, the German scholar Wolfgang Preiser claimed the history of international law to be the youngest branch of legal history.[1] To this day, it also remains among the least developed. The first general historical surveys of international law date from the Revolutionary Era and the nineteenth century.[2] It is certainly no coincidence that a historical discourse that roots back to the heyday of the sovereign state, has been framed in terms of the emergence and rise of the sovereign state. This concern with the sovereign state has determined traditional historiography in two different ways.

First, it has limited the scope of historical research on international law, both chronologically and geographically. As traditional historiography is first and foremost concerned with the history of the sovereign state system and the modern law of nations that went along with it, international legal historians stick to the eras and areas that are relevant to those. The early seventeenth century has been considered as the formative period of the modern law of nations for a long time. As the leading principle of the modern law of nations – or classical law of nations as it is paradoxically also called –[3] was state sovereignty, its inception could not have begun before the sovereign state became a reality. As far as doctrine is concerned, the first publication of Hugo Grotius's (1583-1645) major treatise on the law of nations – *De jure belli ac pacis libri tres* – in Paris in 1625 has often been quoted as the starting point of the modern law of nations. The Peace Treaties of Westphalia of 24 October 1648 fulfil that role for state practice. Because the modern law of nations, just as the sovereign state itself, is of European origin, its historiography is highly Eurocentric.

Over time, the date of origin of the modern law of nations has been moved somewhat backwards in time, though this only had limited practical implications. In the decades around 1900, the role and significance of the so-called precursors of Grotius, chiefly among them the Spanish neo-scholastics and several jurists such as Balthazar Ayala (1548-1584) and Alberico Gentili (1552-1608) were re-evaluated.[4]

1 W. PREISER, *Die Völkerrechtsgeschichte. Ihre Aufgaben und Methoden*, Wiesbaden, 1964, 5.

2 The first survey was that by R. WARD, *An Enquiry into the Foundation and the History of the Law of Nations of Europe*, Dublin, 1795.

3 W. G. GREWE, Was ist klassisches, was ist modernes Völkerrecht ?, in *Idee und Realität des Rechts in der Entwicklung der internationaler Beziehungen. Festschrift für Wolfgang Preiser*, ed. A. Böhm, K. Ludersen and K.-H. Ziegler, Baden Baden, 1983, 111-131.

More recently, diplomatic and international legal historians such as Wilhelm Janssen and Wolfgang Preiser dated the emergence of the state, although in an embryonic form, around 1300.[5] Whereas, over the last century, historians of international law have included the writings of the sixteenth-century 'classics of international law' in their deliberations, even today few or no studies exist about the late-medieval doctrine on *ius gentium.*[6] Pre-Westphalian legal practice is still largely uncharted territory.[7]

Second, the modern law of nations (1648-1919/1945) has been interpreted one-sidedly as a system wherein state sovereignty was the dominant factor. Its story has been told straightforwardly as the tale of the emergence and rise of the sovereign state, from the composite monarchies of the seventeenth century to the nation-state of the nineteenth century. All doctrines, practices and institutions that corroborated this interpretation were highlighted; those that did not go along with it were driven into the shadows, or at best considered outdated or exceptional.

If we analyse the 'popular view' on the modern law of nations as it exists among scholars in the two natural constituencies of international legal history – international law and legal history – we discern an almost unanimous agreement about the general outlines. This *communis opinio* has, until one or two decades ago, only been rarely challenged by the few scholars who might call themselves true specialists in the history of international law and has often even received support from them.

In traditional scholarship, the modern law of nations is often described in terms of what can be called a Hobbesian system. Under this interpretation, the law of nations and international relations are as much under the supreme rule of the Leviathan as the state itself. *Primo,* sovereign states are the sole subjects of the law of nations. Therefore, a strict separation – dualism – of the international and the national legal spheres is upheld. The individual has no rights in the international

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4 J. KOHLER, Die spanische Naturrechtslehrer des 16. und 17. Jahrhunderts, *Archiv für Rechts- und Wirschaftsphilosophie* 1916-1917, 235-263; E. NYS, *Le droit de la guerre et les précurseurs de Grotius,* Brussels, 1882; J. B. SCOTT, *The Spanish Origin of International Law. Francisco de Vitoria and his Law of Nations,* Oxford/London, 1934; Carl VON KALTENBORN, *Die Vorläufer des Hugo Grotius auf dem Gebiete des Jus Naturae et Gentium,* Leipzig, 1848; T. 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/Boston, 1998.

5 W. JANSSEN, Die Anfänge des modernen Völkerrechts und der neuzeitlichen Diplomatie, *Deutsche Vierteljahr Schrift für Literatur und Geistesgeschichte,* 1964, 39; W. PREISER; Über die Ursprunge des modernen Völkerrechts, in *Internationalrechtliche und staatsrechtliche Abhandlungen. Festschrift für Walter Schatzel zum 70. Geburtstag,* ed. E. Bruel, Düsseldorf, 1960, 373-387.

6 See, however, the chapters by Karl-Heinz ZIEGLER, Alain WIJFFELS, Dominique BAUER and Laurens WINKEL in *Peace Treaties and International Law in European History: From the Late Middle Ages to World War One,* ed. R. Lesaffer, Cambridge, 2004. Also J. MULDOON, The Contribution of the Medieval Canon Lawyers to the Formation of International Law, *Traditio* 1972, 483-497; IDEM, Medieval Canon Law and the Formation of International Law, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, kanonistische Abteilung* 1995, 64-82.

7 R. LESAFFER, The Westphalian Peace Treaties and the Development of the Tradition of Great European Peace Settlements prior to 1648, *Grotiana* new series 1997, 71-95.

sphere and the law of nations can never be directly applied or invoked in the sphere of municipal law. Moreover, the state has exclusive jurisdiction over its own territory. *Secundo,* the sovereign states are the sole authors of the law of nations. The law of nations is volitional to the extent that states are only subject to the rules and regulations they have accepted themselves, either expressly or tacitly. Treaties and custom are therefore the only sources of the law of nations. *Tertio,* the sovereign states are the sole enforcers of the law of nations. By consequence, an almost absolute discretion to wage war is granted. In traditional historiography, the *ius ad bellum* of the later seventeenth, eighteenth and nineteenth centuries is often considered to be just that: an – absolute – right to wage war. This also entails a prohibition to intervene in the affairs of other states. States have a right to enforce their rights and claims, but not to the detriment of the exclusive jurisdiction of a state over its territory.[8]

Since the end of World War I, international law has undergone several fundamental changes. The supreme rule of the sovereign state has been severely challenged, even if it has not come to an end. But for a long stretch of time, this upheaval of the international legal system has done little or nothing to quell the 'obsession' with the sovereign state in historiography. It was only during the 1990s, after the end of the Cold War, that things have started to change.

Over the last decade or so, the interest in the history of international law has begun to rise sharply. The number of scholars involved is still too small to speak of a real boom and research remains too unsystematic and uncoordinated to hope for a lasting change for the better. Still the change is remarkable. While before, there were never more than a handful of scholars who might be considered specialists in the field, now there are several dozens. Since 1999, a specialised journal has appeared twice a year.[9] The Max Planck Institute for European Legal History in Frankfurt has sustained a large programme on German international legal scholarship in the nineteenth and twentieth centuries.[10] At New York University and at Tilburg University, two small research groups on the history (and theory) of international law have been formed.

This rise in the interest of the history of international law has largely been ancillary to the ongoing debate on current international law. It is a direct consequence of the great upheaval the international legal order has been going through since the end of the Cold War in 1989-1991. Most 'historical studies' enter into the debate on the essence of international law as it was before 1989-1991 and try to make a contribution to the debate on current evolutions.

Nevertheless, recent scholarship has also made a contribution to the study of

[8] On the traditional interpretation of the modern law of nations, R. LESAFFER, The Grotian Tradition Revisited: Change and Continuity in the History of International Law, *British Yearbook of International Law* 2002, 103-139, at 103-110.

[9] *Journal of the History of International Law,* founded by Professor R. St. J. Macdonald (Halifax) and now in the hands of the Max Planck Institute for European Legal History in Frankfurt and its counterpart of International Law in Heidelberg.

[10] Several monographs have already been published by Nomos Verlag in Baden Baden in the series 'Studien zur Geschichte des Völkerrechts'.

the modern law of nations. Some, if few, scholars have started to challenge the traditional limitations and interpretations about the modern law of nations. The positivist character of several 'classics of international law' from the eighteenth century such as Cornelius van Bynkershoek (1673-1743) and Emer de Vattel (1714-1767) has been challenged as a result.[11] The traditional view that the Treaties of Westphalia laid the groundwork for the modern law of nations has been unmasked as a myth.[12] The outer-European world gets more attention,[13] but only rarely have scholars ventured beyond the limits of 1648 and looked at pre-Westphalian state practice.[14]

On 26 April 2002, the Committee for Legal History of the Royal Flemish Academy of Belgium for Science and the Arts organised a conference in the Palace of the Academy in Brussels on 'State Sovereignty and the Law of Nations (16th-18th centuries)'. The convenors of the conference were Georges Macours and I. Three of the five papers that were presented that day are published in this small volume.

The convenors subscribe to the most recent trends in the historiography of the modern law of nations as expounded above. The papers all deal with an aspect of sovereignty in the law of nations from the early sixteenth to the late eighteenth centuries. As such, the conference also broke through the traditional temporal

11 K. AKASHI, *Cornelius van Bynkershoek: His Role in the History of International Law,* The Hague/London/Boston, 1998; E. Jouannet, *Emer de Vattel et l'émergence doctrine du droit internationale classique,* Paris, 1998.

12 On the Westphalian myth and the challenge against it: S. BEAULAC, The Westphalian Legal Orthodoxy – Myth or Reality?, *Journal of the History of International Law* 2000, 148-177; also in IDEM, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia,* Leiden/Boston, 2004, 71-97; D. CROXTON, The Peace of Westphalia of 1648 and the Origins of Sovereignty, *International History Review* 1999, 569-591; A. EYFFINGER, Europe in the Balance: An Appraisal of the Westphalian System, *Netherlands International Law Review* 1998, 161-187; P. HAGGENMACHER, La paix dans le pensée de Grotius, in *L'Europe des traités de Westphalie. Esprit de diplomatie et diplomatie de l'esprit,* ed. L. Bély, Paris, 2000, 68-79; R. LESAFFER, The Westphalian Peace Treaties; A. OSIANDER, Sovereignty, International Relations and the Westphalian Myth, *International Organization* 2001, 251-287; M. SCHRÖDER, Der Westfälische Friede – eine Epochengrenze in der Völkerrechtsentwicklung?, in *350 Jahre Westfälischer Friede. Verfassungsgeschichte, Staatskirchenrecht, Völkerrechtsgeschichte,* ed. M. Schröder, (Schriften zur europäischen Rechts- und Verfassungsgeschichte, XXX), Berlin, 1999, 119-137; H. STEIGER, Der Westfälischen Frieden – Grundgesetz für Europa?, in *Der Westfälische Friede. Diplomatie, politische Zäsur, kulturelles Umfeld, Rezeptionsgeschichte,* ed. H. Duchhardt, Munich, 1998, 33-80; K.-H. ZIEGLER, Die Bedeutung des Westfälischen Friedens von 1648 für das europäische Völkerrecht, *Archiv des Völkerrechts* 1999, 129-151; IDEM, Der Westfälischen Frieden von 1648 in der Geschichte des Völkerrechts, in *350 Jahre Westfälischer Friede,* 99-117.

13 A. ANGHIE, *Imperialism, Sovereignty and the Making of International Law,* Cambridge, 2005; E. KEENE, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics,* Cambridge, 2002; R. TUCK, *The Rights of War and Peace. Political Thought and International Order from Grotius to Kant,* Oxford, 1999.

14 However, for the centuries directly preceding Westphalia, see the contributions mentioned in note 6, 7 and 8 and R. LESAFFER, *Europa: een zoektocht naar vrede? (1453-1763/1945-1997),* Leuven, 1999. Also H. STEIGER, Bemerkungen zum Friedensvertrag von Crépy en Laonnais vom 18. September 1544 zwischen Karl V. und Franz I., in *Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt,* Heidelberg, 1995, 241-265.

limits set to the study of the modern law of nations. While it is correct that the modern law of nations was only truly established after Westphalia, the continuities between the eras before and after 1648 need to be taken into account as well. In order to be able to do so, historians must first turn their attention to the pre-Westphalian law of nations.

Of the three papers published here, two cover the period before Westphalia and one covers the Revolutionary Era. Paul van Peteghem (Catholic University of Nijmegen) delves into the treaty practice of the early sixteenth century. He analyses three important peace treaties between the Emperor Charles V and Francis I of France: Madrid (1526), Cambrai (1529) and Crépy-en-Laonnais (1544). Thanks to a close scrutiny of the sources, he is able to give a clearer view on the universal aspirations Charles V pursued as late as 1544.

Guus van Nifterik (then of the Free University of Amsterdam, now of the University of Amsterdam) discusses the works of some of the great authors of the law of nations and political doctrine from Vitoria (1483/1493-1546) to Grotius on the matter of intervention. His paper shows that intervention for the protection of another prince's subjects had a strong foothold in sixteenth- and early seventeenth-century doctrine, and that this intervention was not restricted to matters of religion. As such, something which could very well be considered a forerunner of our present-day international humanitarian intervention took an important place in the minds of some of the fathers of the 'modern law of nations'. This paper could certainly inspire new research into the writings of later classics of international law and possibly lead to reassessing traditional interpretations.

Marc Belissa (Paris X Nanterre) argues that the nation-state only came to the fore of the French Revolutionaries' discourse after 1793. Before, it was not a concern with the nation-state, but with 'fraternité universelle' and the 'cosmopolitique' that dominated the discourse of the philosophers of the Enlightenment and the leaders from the first years of the Revolution. Far from defending an unlimited sovereignty of the state, they subjected it to the concerns of mankind and to natural law and even thought of a more federative approach to international relations and law.

As it stands, this books says nothing about the late seventeenth and early eighteenth centuries, when the 'modern law of nations' of the pre-Revolutionary Era was truly established. In an earlier paper, I made a case for a less one-sided and more dualistic interpretation of the 'modern law of nations', in particular of that period.[15] The decades after Westphalia might have seen the elaboration of an international legal order that was based on the sovereign state, but at the same time it was an attempt to organise and thus restrict the free arbiter of the now sovereign powers of Europe. As such, it was a reaction against the chaos and anarchy the achievement of external sovereignty, itself a consequence of the Reformation and the failure of Charles V's imperial dreams, had wrought upon the Latin West.

At the conference, two more papers were presented that covered two aspects of international legal practice of this period. Stephen Neff (University of

15 LESAFFER, Grotian Tradition.

Edinburgh) spoke on Treaties of Friendship, Commerce and Navigation. Georges Macours (Catholic University of Leuven, campus Kortrijk) shed some light on the practice of extradition treaties between France and the Austrian Netherlands, an example of how the European powers tried to come to terms with some of the consequences of the sovereign state system. These scholars' views have been published elsewhere.[16]

The editors of this volume would like to thank all who participated to the 2002 conference and contributed to this book. We are also indebted to the Royal Flemish Academy of Belgium for Science and the Arts, its Permanent Secretary and staff. A special word of thanks goes to Mrs. Jo Alaerts, secretary of the Leuven Law Faculty's Department of Roman Law and Legal History, for her help in organising the conference and editing this book.

[16] See G. MACOURS, *Ne crimina impunita maneant. De 18e eeuwse Frans-Zuidnederlandse uitleveringspraktijk*, Kortrijk, 1996; S. Neff, *The Rights and Duties of Neutral: A general history*, Manchester, 2000; IDEM, Peacemaking and Prosperity: Commercial Aspects of Peacemaking, in *Peace Treaties and International Law*, 365-381.