Chapter I

Narrating the History of International Law

Two Court Decisions

Samuel Arthur Worcester (1798 – 1859) had a problem with the choice of his residence. The Protestant pastor had decided to do missionary work among the Native American "nation" of the Cherokee, whose hereditary lands lay in the western part of the US State of Georgia. In 1828, he had settled at New Echota, the ancient Cherokee centre of government. But Georgia State law stood against Worcester's missionary efforts. In 1830, State legislation passed the "Indian Removal Act", which obliged everyone wishing to live on Cherokee territory, to register with Georgia state authorities. But Worcester had not done so. Therefore, he became subject not merely to interrogation by Georgia adjudicative and government institutions but also had to face the US federal government. The Georgia state court found Worcester guilty of having resided on Cherokee territory without proper registration, thereby infringing upon the "Indian Removal Act". The law had been enacted to force the Cherokee to give up their hereditary lands. Worcester took the act to be unlawful and refused to abide by it. The court sentenced him to four years of hard work in prison.

The incident occurred in 1831, 55 years after the Declaration of Independence of the British colonial dependencies in North America, 48 years after the Peace of Paris, by which the British government acknowledged their independence,[1] and 43 years after the launching of the process approving of the Constitution through which the USA became a federal state. The Cherokee belonged to the Native American group of the Iroquois, who had long insisted upon their autonomy.[2] Worcester was unimpressed by the stipulations of the US Constitution, maintained that the Cherokee were living in a state of their own and that, by consequence, agencies of the US State of Georgia had no jurisdiction over persons residing on Cherokee territory, and appealed against his imprisonment to the US Supreme Court in Washington, DC. Indeed, the Court took up the case and, in 1832, decided that the Cherokee were "considered a distinct, independent political community, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial" and, by virtue of that fact, were a self-governing state.[3] Chief Justice John Marshall (1755 – 1835), who was famous for his principled, unconventional verdicts,[4] concluded that the "Indian Removal Act" was unconstitutional, and ordered Worcester's immediate release, if necessary through the use of force by the US federal government.

This was not the first time that the Supreme Court became concerned with Cherokee issues. Already in the previous year, it had to consider a Cherokee claim against the State of Georgia concerning the "Indian Removal Act". Implementing the act, the government of Georgia had ordered the Cherokee to evacuate their hereditary lands and move to a reservation in Oklahoma which at the time was not a US federal state. In its verdict, the Court, again under Marshall's chairpersonship, found that the Cherokee were a state but stood under US government protection by stipulation of the Treaty of Hopewell made out on 28 November 1785.[5] Previously, the US government had

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[1] Treaty UK [United Kingdom of Great Britain and Ireland] – USA, Paris, 3 September 1783, in: *CTS* [Clive Parry, ed., *The Consolidated Treaty Series*, 231 vols (Dobbs Ferry, 1969-1981)], vol. 48, pp. 489-498.

[2] Daniel P. Barr, *Unconquered. The Iroquois League at War in Colonial America* (Westport, CT, 2006). Francis Jennings, *The Ambiguous Iroquois Empire. The Covenant Chain Confederation of Indian Tribes with English Colonies from its Beginnings to the Lancaster Treaty of 1744* (New York, 1984).

[3] USA, Supreme Court; *Samuel Arthur Worcester vs State of Georgia*, 31. U. S. (15 Peters) 15. 1832, January 1832 [http:// caselaw.lp.findlaw.com/scripts/getca].

[4] R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge, 2001), pp. 386-457. Newmyer, *The Supreme Court under Marshall and Taney*, second edn (Wheeting, IL, 2006) [first published (Wheeting, IL, 1968)]. Charles Warren, *The Supreme Court in the United States History*, vol. 1 (Boston, 1926), pp. 189-239 [new edn (Boston, 1928); revised edn (Boston, 1947); reprint (Littleton, CO, 1987)].

[5] Treaty Cherokee – USA, Hopewell, 28 November 1785, Art. III, in: *CTS*, vol. 49, pp. 443-446, at p. 444.

concluded an agreement with the Native American Cayugas Mohawks, Oneidas, Onondagas, Seneca and Tuscarora. This treaty had explicitly placed these groups under US "protectorate", while recognising their statehood.[6] The Court assumed that the Hopewell treaty had established a "protectorate" over the Cherokee as well, which the subsequent Treaty of Holston of 7 July 1791 had confirmed,[7] and refused to deliberate the case[8] on the ground that it was not in charge of disputes between the USA and a state under US "protectorate". Even though it ranked the Cherokee as a state outside the USA, the Court ignored the fact that the Cherokee and the neighbouring Choctaw were maintaining treaty relations with Spain.[9] The Court took the view that the US government was neither obliged nor legitimised to intervene militarily or politically into a conflict between Georgia and the Cherokee. In the case, however, that the "Indian Removal Act" should affect personal interests of residents on Cherokee territory, the Court might take up the case again. Worcester benefited from this concession. Although, by implication, the Supreme Court had encouraged the Cherokee to resubmit their case in a different way, the Georgia State government interpreted the 1831 decision as a mandate to enforce the "Indian Removal Act", expecting that the US federal government would approve of the act. Yet, even when the Court scrapped the act in 1832, the US government did not intervene on Worcester's behalf. President Andrew Jackson (1767 – 1845, in office 1829 – 1837), who had previously been a field commander in US military campaigns against Native Americans and sympathised with the "Indian Removal Act", responded to the Court verdict with the remark that the Court should send troops into Georgia, if it wished to do so, and left Worcester and the Cherokee to the mercy of the Georgia State agencies. Wilson Lumpkin (1783 – 1870), then Governor of Georgia, lifted the sentence against Worcester already in 1832, while forcing the Cherokee into emigration to Oklahoma in the literal sense:[10] after eventually futile resistance, crushed by 1835, they were forced to agree to cession treaties and had to walk or travel on boats to the reservation assigned to them, where their descendants are still living today.[11] In 1855, the US Commissioner for Native American affairs found 2.200 Cherokees in areas east of Arkansas,

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[6] Treaty Six Nations [Cayuga, Mohawk, Oneida, Onodaga, Seneca, Tuscarora = Haudenosaunee = The People of the Longhouse] – USA, Fort Stanwix, 22 October 1784, preamble, in: *CTS*, vol. 49, p. 169; also in: Barbara Graymont, *The Iroquois in the American Revolution* (Syracuse, 1972), pp. 297-298.

[7] Treaty Cherokee – USA, Holston, 2 July 1791, Art. II, in: *CTS*, vol. 51, pp. 169-173, at p. 169.

[8] USA, Supreme Court; *The Cherokee Nation vs. State of Georgia*, 30. U. S. (5 Peters) 1. 1831, January 1831 [http://caselaw.lp.findlaw.com/scripts/getca].

[9] Treaty Choctaw – Spain, Movila, 14 July 1784, in: *CTS*, vol. 49, pp. 109-112. Manuel Serraño y Sanz, *España y los Indios Cherokis y Chactos en la segunda mitad del siglo XVIII* (Sevilla, 1916).

[10] Walter H. Conser, Jr, 'John Ross and the Cherokee Resistance Campaign. 1833 – 1838', in: *Journal of Southern History* 44 (1978), pp. 191-212. At p. 191, Conser classified the Cherokee, Creek, Choctaw, Chickasaw and Seminole as "Five Civilized Tribes" "with a written language, a newspaper, numerous missionary schools, ample farms and even black slaves". Without adducing supportive evidence, he claimed that what he perceived as compliance with some "standard of civilisation" was the reason why the Cherokee "removal" raised public concern among contemporaries.

[11] Treaty Cherokee – USA, 6 May 1828, in: *CTS*, vol. 78, pp. 294-298. Treaty Cherokee – USA, 14 February 1833, in: *CTS*, vol. 83, pp. 174-177. Treaty Cherokee – USA, New Echota, 29 December 1835, in: *CTS*, vol. 85, pp. 410-420. For surveys on the Cherokee cases see: Stuart Banner, How the Indians Lost Their Land. Law and Power on the Frontier (Cambridge, MA, 2005), pp. 214-226. Grant Foreman, *Indian Removal. The Emigration of the Five Civilized Tribes of Indians* (Norman, OK, 1932), pp. 229-312 [reprints (The Civilization of the American Indians, 2) (Norman, OK, 1953; 1956)]. Jill Norgreen, *The Cherokees. Two Landmark Federal Decisions in the Fight for Sovereignty* (Norman, OK, 2004). Theda Perdue, ed., *The Cherokee Removal. A Brief History with Documents* (Boston, 1995). Francis Paul Prucha, *Cherokee Removal* (Lincoln, NE, 1981), pp. 246-247, 250-254. Prucha, *The Great Father. The United States Government and the American Indians*, 2 vols (Lincoln, NE, 1984). Prucha, *American Indian Treaties. The History of a Political Anomaly* (Berkeley and Los Angeles, 1994), pp. 96-99, 156-182. Lindsay Gordon Robertson, *Conquest by Law. How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (Oxford and New York, 2005), pp. 118-138. Michael Paul Rogin, Fathers and Children. *Andrew Jackson and the Subjugation of the American Indians* (New York, 1975). Kenneth W. Treacy, 'Another View on Wirt in the Cherokee Nation', in: *American Journal of Legal History* 5 (1961), pp. 385-388. Charles F. Wilkinson, *American Indians, Time and the Law. Native Societies in a Modern Constitutional Democracy* (New Haven, 1987), pp. 93-105.

while counting 17.500 west of that state.[12] Like other Native American states, the Cherokee state has never been formally dissolved. As late as in 1923, the Six Nations (Iroquois) requested admission to the League of Nations and recognition as "a State within the meaning of Article 17 of the Covenant", basing their request on several agreements with the USA made out between 1784 and 1842.[13]

In both its decisions, the Supreme Court took for granted that there was a Cherokee state, and it did so for cogent reasons. The US federal government had made altogether four indefinite peace agreements with the Cherokee, the latest on 14 September 1816, after some 500 Cherokee warriors had fought on the US side against the Creek in 1814.[14] These four general treaties were supplemented by a series of specific instruments obliging the Cherokee to cede sections of their hereditary lands to the USA. All these agreements followed the rules of the European public law of treaties between states. According to that law, agreements between states could only come into existence, if the contracting parties recognised each other mutually as self-governing, sovereign and equal in legal terms. Consequently, if the USA were a state, so were the Cherokee. By stipulation of the 1816 treaty, still in force in 1832, the Cherokee maintained relations with the US federal government under international law.

In 1832, there could not be any doubt about the fact that the USA was a self-governing and sovereign state. But how could the US Chief Justice, at the same time, contend that the Cherokee had their own state on US territory, constituted by "original rights", that is legal entitlements that were older than the USA and, thereby, not based upon a privilege given by the US government? Various answers were possible to the questions what a state was, who decided about the statehood of a political community and whether a state was self-governing and sovereign. In Cherokee perspective, their political community had long existed as a state and had been acknowledged as such by the US federal government by virtue of the treaties. For the US Supreme Court, the Cherokee political community was a state that was subject neither to US federal nor to Georgia State jurisdiction. For the Georgia state government, the Cherokee political community was not a state but existed unlawfully on Georgia territory. For President Jackson, answers to these bothersome questions were not his business but that of the Supreme Court and the State of Georgia; hence, Georgia State agencies might, according to Jackson, act as they wished.

The questions laid before the US Supreme Court in 1831 and 1832 touched upon the conflict between norms of municipal and international law. The Court did not rule explicitly what a state was and which "innate rights" it might claim. Yet, the Court decisions unequivocally drew a line between US domestic constitutional law and international law. US constitutional law was laid down positively in a written document, whereas international law was then largely a set of customarily applied norms. However, the US decisions relating to the question of whether the Cherokee political community was a state, did not settle the disputes between the contending parties, which was eventually resolved through the use of force to the disadvantage of the Cherokee. In both its verdicts, the Supreme Court applied the theoretical framework of international law with which European immigrants to North America were familiar, but failed to take notice of Cherokee legal thought. The law considered valid among states has not always been grounded on consensus.

A further aspect of the legal context of the Cherokee cases confirmed this finding. This

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[12] USA, *Annual Report of the Commissioner of Indian Affairs. 1855* (Washington, DC, 1856), p. 226.

[13] The Cherokee Nation, The Official Website of the Cherokee Nation. Oklahoma, USA [http://www.cherokee.org/]. On the Six Nations case see: League of Nations, *Official Journal* (1924), p. 829. Hersch Lauterpacht, *Recognition in International Law* (Cambridge Studies in International and Comparative Law, 3) (Cambridge, 1947), pp. 49-50 [further edn (Cambridge, 1948); reprint (Cambridge, 2013)]. For Seneca agreements see: Treaty Six Nations (note 6). Treaty Six Nations [Cayuga, Mohawk, Oneida, Onodaga, Seneca, Tuscarora = Haudenosaunee = The People of the Longhouse] – USA, Fort Harmar 9 January 1789, in: *CTS*, vol. 50, pp. 405-419. Treaty Six Nations – USA, Buffalo Creek, 15 January 1838, in: *CTS*, vol. 87, pp. 332-346 [cession treaty]. In their official website, the Seneca continue to maintain the position that the relationship of their government with the US government is one between two sovereign governments [sni.org/faq].

[14] Treaty Cherokee – USA, 14 September 1816, Art I, in: *CTS*, vol. 66, pp. 326-327, at p. 326. On Cherokee-US relations up until 1814 see: Michael Paul Rogin, *Fathers and Children. Andrew Jackson and the Subjugation of the American Indians* (New York, 1975), p. 156.

aspect relates to the four subsequent peace agreements between the Cherokee and the US government. The first treaty, concluded at Hopewell in 1785, terminated the state of war between the Cherokee and the emergent USA in so far, as the Cherokee had maintained friendly relations with the British government, even dispatching a mission to London in 1762, and had, in 1776, sided with the British government in the War of American Independence and attacked colonial settlers in North Carolina. Colonial militias from North Carolina and Virginia had launched a counterattack and inflicted a serious military defeat upon the Cherokee.[15] The British-US peace agreement of 1783[16] was not binding for the Cherokee, so that they remained British alliance partners in a legal terms. Hence, it was reasonable from the point of view of the American revolutionaries to enter into an indefinite peace agreement with the Cherokee with the intention of ending the state of war. Yet, the Hopewell treaty did not remain to only peace agreement. Rather, the peace was established again through three further agreements, all written out indefinitely and without a war having occurred in the meantime. Thus, the Holston treaty of 1791 established a new "perpetual" peace, which, in fact, had continuously been in existence since 1785. The practice of setting peace among parties, which had not previously been at war, was not new as such, as European governments had done on several previous occasions. But it had been unusual for contracting parties to agree on a "perpetual"[17] or "firm"[18] peace repeatedly within a few years. The use of this practice with regard to the Cherokee suggests that the details of the European formulary of peace treaties had been petrified into formulae, with the legal significance of which the drafters of these agreements were no longer thoroughly familiar. As all Cherokee agreements were made out at US government request and exist only in English versions, it is arguable to surmise that the US side drafted the texts and submitted the drafts to the Cherokee for approval. Thus, the treaties, laid down in writing, subjected the Cherokee to the norms of the European public law of treaties among states, although the Cherokee had not consented to the application of these norms. There was no consensus between the Cherokee and the US government about the application of the European public law of treaties among states.

The US government acted upon the assumption that peace could only come into existence as a consequence of purposeful human action and through written legal instruments. It further assumed that the peace that had been agreed upon could only be considered as lasting if it was renewed on given occasions. Peace, thus, appeared to be fragile, and the expectation that peace might not be lasting, fuelled the demand that parties to peace treaties should prepare themselves for the eventuality of a future war. Early in the nineteenth century, this demand was part of a more wide-ranging theory of the law of war, according to which war but not peace appeared to be the normal condition of the human world, as the Leipzig theologian Heinrich Gottlob Tzschirner (1778 – 1828)[19] and the Prussian officer Jakob Otto August Rühle von Lilienstern (1780 – 1847)[20] simultaneously argued. For the conduct of their relations with Native Americans, the American revolutionaries accepted the theoretical paradigm of the sequence of war, peace and again war. Yet, the Cherokee were unfamiliar with this sequential paradigm. For them, peace was the normal condition of the human world, might be interrupted through the ceremonial digging up of the hatchet, would be restored at the end of the war and, consequently, was not in need of renewal or extension. With the superimposition of the European public law of treaties among states, the US government also obliged the Cherokee to accept a contemporary theory of the law of war which was unreasonable to them. Neighbouring Native American states, among them those of the Choctaw[21] and the Chickasaw,[22] experienced the same fate.

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[15] Thomas A. Hatley, *The Dividing Paths. Cherokees and South Carolinians Through the Era of Revolution* (New York, 1993), S. 142-143, based on: *Lloyd's London Evening Post* (21-23 June 1762).

[16] Treaty UK (note 1).

[17] Treaty Cherokee (note 7), Art. I, p. 169.

[18] Treaty Cherokee (note 14), Art. I, p. 326.

[19] Heinrich Gottlieb Tzschirner, *Ueber den Krieg* (Leipzig, 1815), pp. 103-109.

[20] Jakob Otto August Rühle von Lilienstern, *Apologie des Krieges* [first published (Frankfurt, 1814)], edited by Jean-Jacques Langendorf (Vienna, 1984), pp. 33, 35.

[21] Treaty Choctaw – USA, Hopewell, 3 January 1786, in: *CTS*, vol. 49, pp. 451-456.

[22] Treaty Chickasaw – USA, Hopewell, 10 January 1786, in: *CTS*, vol. 49, pp. 457-459.

The US government not only subjected Native American states to the constraints of the European public law of treaties among states. Instead, upon the occasions of the conclusion of new peace agreements, it repeatedly stepped up demands for the cession of land as a condition for the making of new peace agreements. In each of these occasions, the US government expected the Cherokee to be willing to use their sovereignty to the end of renouncing rights over their hereditary lands. As the traditional Cherokee economy stood in the way of European immigrant desire to exploit the mineral resources under Cherokee hunting grounds, the US government pressured the Cherokee to vacate their lands and to convert into agriculturalists. It mistook hunting as an apparently "uncivilised" way of life and ascribed to itself the task of "civilising" Native Americans. With regard to the Cherokee, these "civilising" missions came to be cast into legal form in the Holston treaty of 1791, obliging the Cherokee to give up hunting in lieu of the cultivation of the soil.[23]

Following their military defeat, the Cherokee opted for the use of legal means to resist the progressive infringements upon their sovereignty. In doing so, they paid a high price. In order to become entitled to appeal to the US Supreme Court in their dispute with the Georgia State government, they had to recognise an institution of the USA as superior to themselves. But they did not only at their own discretion reduce their sovereignty significantly by choosing this path, they even had to accept the principles that they had no entitlement to approach the US Supreme Court and that the Court was autonomous in its decision to accept or to reject the case. The Court avoided a verdict in favour of the plaintiffs by waiving competence, even though the "Indian Removal Act" violated human rights as laid down in the US Constitution. John Marshall used the alleged "protectorate" status of the Cherokee state instead of helping the Cherokee out of their plight. But he was unwilling to take into consideration the counterargument that the US government, according to his own reading of the Hopewell treaty of 1785, had pledged to "protect" the Cherokee and would, by consequence, have been bound to act against the Georgia State government. Faced with the decision, whether to grant priority to US government "protection" for the Cherokee or to the expansionist demands of the settler colonists, Marshall opted for the latter, thereby allowing might to be placed above right. That he decided otherwise in Worcester's case did not reduce the weight of his first verdict. The two cases left undecided the issue what rights the Cherokee state might have in general and vis-à-vis the USA in particular.

The fate of the Cherokee points to two basic questions relating to the history of international law: What kind of political community has been a state when and in which parts of the world? Who has made decisions when and where what kind of political communities are to be recognised as states? How have concepts of the state changed? How have actors in their respective cultures and periods have perceived of the relationship between peace and war in legal terms and how have interactions among cultures affected these perceptions?

What is International Law?

Before entering into these issues, the more fundamental question has to be raised what international law is. Why is its history important and what has been changing in it? Answers to these questions require the clarification that the historiography of international law like, indeed, the historiographies of all other fields of law, can be pursued as a legal or as an historical inquiry. In the legal perspective, the description and analysis of the history of international law aims at the explanation of the present perceived as having evolved through time. This perspective, therefore, seeks to trace current international legal theories and practices to their origins in the past or, conversely speaking, to investigate the histories of past legal norms that have a continuing impact on the present. By contrast, in historical perspective, it is the aim to describe and, if possible, to explain past changes that can be discerned in the past, and to establish their relevance for the present. Orienting the historiographical narrative towards the present as the apparent goal of some evolutionary process and focusing on past changes without concern for goals are mutually exclusive principles, whence a decision between

[23] Treaty Cherokee (note 7), Art. XIV, p. 171.

both must be made. As by far the largest number of existing surveys of the history of international law has been written within the legal perspective, adherence to this perspective will provide few new insights. Therefore, the following survey will be based on the historical perspective. Moreover, the historical perspective, as focused on processes of change helps avoid the impression, hardly ever justified on suitable evidence, that those changes of legal norms have principally been unidirectional in pointing only towards specifiable goals in the present.

The temporal dimension, in which changes of sets of international legal norms and their handling have taken place, is longer than that of most other sets of legal norms. The validity of the statement that international law has a long tradition behind it, has, it is true, been contested, most recently by Heinhard Steiger (1933 -),[24] publicist at the University of Gießen, as well as by Martti Koskenniemi (1953 -),[25] international law at the University of Helsinki. With regard to Europe, Steiger would ascribe only a few centuries, Koskenniemi no more than a few decades to the history of international law, as it is now known. Yet even a brief look at sources relevant for the history of international law reveals the great tradition shaping core elements of international law, as known in Europe and extending far beyond the continent of Europe to the Ancient Near East and to China. In the Ancient Near East, this tradition goes back to the twenty-fourth century BCE, in China to the sixth century BCE. In the Ancient Near East, pragmatic writings, mainly treaties, provide essential evidence for the great tradition, while in China, it is on record in writings associated with Confucius (Kong Zi, 551 – 479 BCE).[26] Some of Confucius's works have been known in Europe since the seventeenth century[27] and philosopher Christian Wolff (1679 – 1754)[28] at the University of Halle subjected them to serious study. In East Asia, the international legal theory articulated in Confucian writings continued to have an impact well into the early twentieth century,[29] while Wolff's views on international law were still regarded as applicable in the 1930s.[30] Consequently, international law in older periods was not just conceivable as a "law in between powers", as Steiger has maintained,[31] but could be perceived as a set of legal norms that were positioned above institutions of government. International legal norms differed from other sets of legal norms by featuring a category of change, which historian Fernand Braudel (1902 – 1985) has termed the "longue durée" with regard to economic history.[32] Braudel used this term for changes that take place across the centuries and which contemporaries can hardly notice. Applied to the history of international law, the category of the "long durée" implies that a perception could arise in which international law appeared to be an unchangeable set of norms, seemingly flowing from divine will or some disposition of nature. The historical retrospective, recognises the relevance of the "longue durée", acknowledges the past

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[24] Heinhard Steiger, 'Zum fränkischen Kriegsrecht des karolingischen Großreiches (741 – 840)', in: Wilhelm Fiedler, ed., *Verfassungsrecht und Völkerrecht. Gedächtnisschrift für Wilhelm Karl Geck* (Cologne, 1989), pp. 803-829. Steiger, 'Zwischen-Mächte-Recht im Frühmittelalter', in: Michael Jucker and Martin Kintzinger, eds, *Rechtsformen internationaler Politik* (Zeitschrift für Historische Forschung, Beiheft 45) (Berlin, 2011), pp. 47-74. Steiger, *Die Ordnung der Welt. Eine Völkerrechtsgeschichte des karolingischen Zeitalters (741 – 840)* (Cologne, 2010), pp. 245-293.

[25] Martti Antero Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law. 1870 – 1960* (Cambridge, 2002), p. 298 [5. Aufl. Cambridge 2008].

[26] *Lī kī* [Kong Zi, Confucius], edited by James Legge (The Sacred Books of the East, 27.28) (Oxford, 1885) [reprint (Delhi, 1964)].

[27] Philippe Couplet, Prospero Intorcetta, Christian Herdtrich and François Rougement, *Confucius Sinarum philosophus sive scientia Sinensia latine exposita* (Paris, 1687).

[28] Christian Wolff, *Jus Gentium methodo scientifico pertractatvm* (Halle, 1749) [reprint, edited by Marcel Thomann (Wolff, Gesammelte Werke, section B, vol. 25) (Hildesheim and New York, 1972)].

[29] Ju-Jia Ou, *Zhi xin bao*, nr 38 (1897), pp. 444-445 [partly translated in: Rune Svarverud, *International Law and World Order in Late Imperial China. Translations, Reception and Discourse. 1840 – 1911* (Sinica Leidensia, 78) (Leiden, 2007), p. 202].

[30] Otfried Nippold, 'Einleitung [written 1917]', in: Christian Wolff, *Jus gentium methodo scientifica pertractatum*. Reprint, edited by Otfried Nippold, vol. 1 (Oxford, 1934), pp. XIII-LVI, at p. LVI.

[31] Steiger, 'Kriegsrecht' (note 24).

[32] Fernand Braudel, 'Histoire et sciences sociales. La longue durée', in: *Annales ESC* 13 (1958), pp. 725-753]

theoretical perception of the apparent lack of changeability of international legal norms and uncovers the factors that contributed to the change of this perception.

In the history of international law, as in almost every aspect of life, the matter, that is legal norms themselves, becomes exposed to change in ways that differ from those affecting words used to give expression to norms and concepts employed to define and to categorise norms. First and foremost, the differences relate to the speed of changes taking place. Moreover, changes neither concur in time across cultures nor do they necessarily take place in the same direction. Words remaining long in use can stand for various legal norms and can connect these norms with different concepts. Legal norms can exist, even if there are no words to give voice to them. Or different words can refer to the same legal norms at different times. Or words can linger on as fossils, after the norms they used to denote were abandoned. Concepts, in continuous use, but under varying definitions, can relate with different words and different norms at various times and across cultures.

This general rule applies to the words and concepts of international law as well. Various words have been in use over time for this field of law, among them law among states, law of war and peace. German *Völkerrecht*, like French *droit des gens* and English law of nations, is a loan formation derived from Latin *ius gentium*. However, the original Latin phrase, at the time of the ancient Roman Republic and Empire, related to domestic law, which Romans believed to be current among all "nations" (*gentes*).[33] The *ius gentium* in this sense overlapped with Roman law to the extent that it comprised norms, which Romans considered to be valid among themselves as well as in other "nations". Simultaneously, however, *ius gentium* was a summary term for legal norms by which non-Romans had to comply in Rome. This meaning of *ius gentium* continued well into the thirteenth century, when St Thomas Aquinas (c. 1225 – 1274) still used it.[34] Hence, during these times, *ius gentium* had no connection with international law.[35] The set of legal norms, now referred to as international law, was "law of war and peace" (*ius belli ac pacis*) for Marcus Tullius Cicero (106 BCE – 43 CE)[36] and already at his time formed part of the tradition going back into the Ancient Near East. It continued in the Mediterranean area as well as in Europe north of the Alps well into the sixteenth century. At the turn towards the seventeenth century, a change of words occurred in Europe. The new phrase "law among states" (*ius inter gentes*) not only came to express the old "law of war and peace", but also allowed the reconceptualisation of the "law of war and peace", widening its scope to include legal issues beyond norms about war and peace.[37] Subsequently, at the turn towards the nineteenth century, the new formula "international law" appeared in Europe, first in English speaking areas.[38] The formula quickly spread into Spanish as *derecho internacional*, then also into Russian as *mežđunarodnogo pravo* and into German as *internationales Recht*. That international legal norms themselves changed during these transformations of words and concepts goes without saying. The following survey takes into account these transformations of words and concepts. In Chapters 2, 3, 4 and 5, "law of war and peace", in subsequent Chapters 6, 7 and 8, "law among states" and in Chapters 9, 10, 11 and 12, "international law" shall be used, irrespective of the terminology recorded in sources. The narration shall remain within the confines of those legal norms that formed the core of international legal theory and practice to the end of the sixteenth century, namely the "law of war and peace".

Taking into consideration several cultures widens the range of words and concepts

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[33] Corpus iuris civilis. Institutiones; Digesta; partly edited by Okko Behrends, Rolf Küntel, Berthold Kupisch and Hans Hermann Seidel (Heidelberg, 1995), Dig. 1,1,9, p. 94; Inst. 1, 2, 1, p. 2. Isidore of Seville, *Etymologiarvm sive originvm libri XX*, edited by Wallace Martin Lindsay (Oxford, 1911), chap. V/4.

[34] Thomas Aquinas, *Summa theologiae*, chap. II/2, q. 57 a. 3, edited by Roberto Busa SJ, *Sancti Thomae Aquinatis Opera omnia*, vol. 2 (Stuttgart, 1980), pp. 573-768, at p. 599.

[35] Max Kaser, *Ius gentium* (Forschungen zum Römischen Recht, 40) (Cologne, Weimar and Vienna, 1993), p. 15.

[36] Marcus Tullius Cicero, *De re publica* [various edns], chap. II/17, nr 31.

[37] Francisco Suárez, SJ, *De legibus (III 1-16)*, chap. II/19, nr 3, 6, edited by Luciano Pereña Vicente and Vidal Abril (Corpus Hispanorum de pace, 15) (Madrid, 1975), pp. 56-58, 60-62.

[38] Jeremy Bentham, 'Introduction to the Principles of Morals and Legislation [1789]', chap. XIX/2, nr 25, in: *The Works of Jeremy Bentham*, edited by John Bowring, vol. 1 (London, 1838), pp. 1-154, at p. 149 [reprint of this edn (New York, 1962)].

applying to international legal norms. Not only can different words stand for the same legal norm in different cultures, but words can also be exchanged across cultures, thereby taking up new meanings in addition to or replacing the meanings they had originally had. The referent matter, that is the legal norms themselves, can also migrate across cultures and become expressed through words not applied to them in their culture of origin. Changes of legal norms, words and concepts can take place at different speeds in different cultures. What counts as brand new in one culture, is an old hat, long in use in another one.

The range of variations of norms, words and concepts has to be taken into consideration in a definition of international law applicable across epochs and cultures. This definition must allow the incorporation of the changes that the narration seeks to describe and, if possible, to explain. Hence, a definition of international law including only twentieth- and twenty-first-century legal norms and their application to relations among states is not helpful in an historical narrative. This is so, because the conceptualisation of international law as a set of norms regulating solely relations among states and the very assumption that states can be perceived as "actors" is peculiar to the nineteenth and twentieth centuries and should not regarded as self-evident for all times. Instead, it seems more conducive to an historical narrative to define international law as a set of norms considered capable of regulating a cross-border collective action of communities whose members mutually recognise each other as outsiders. Within that definition, legal norms shall be mandates regarded as enforceable through sanctions and apt to restrain the freedom of collective and individual choice of patterns of action. According to this definition, international legal norms do not have to be laid down in systematic collections or in any other type of codified form in order to have legal quality. Instead, in the law of war and peace, the law among states and international law, the legal quality of their norms results solely from the recognisable fact that these norms can stipulate or prevent certain kinds of actions, without having to do so under all circumstances.[39] That means that international legal norms continue to exist even if their breach is on record. Thus, legal norms, like all other legal norms, continue to remain in force, as long as their breach continues to be attested and appropriate measures continue to be taken against breaches. Not all communities, into which persons may unite, can be subjects under international law, but only those featuring some form of institutional rule. [40] By contrast, individual persons may be credited with subjecthood under international law, for example as military leaders or as plaintiffs against communities, if they are themselves members of a community. The following narrative focuses on political communities without, however, ignoring other types of communities. Political communities shall be defined as groups with a common discernible goal or purpose and governed by legitimate institutions of rule. Political communities with the competence of legislating legal norms for specifiable groups shall be considered as states if they derive that competence from no superior legitimising institution. In order to qualify as states, political communities do not have to have exclusive control over a territory demarcated through linear borders, even though nineteenth-century theories of the state[41] and twentieth-century international legal theories[42] set precise this condition. Nevertheless, states, whose original legislative competence is not subject to the control by ruling institutions of another state, shall be defined as sovereign. Other communities, such as long-distance trading companies or other merchant guilds, can become privileged to act under international law, even though they are not political communities in their own right.

From these definitions follows the conclusion that international legal norms can only become effective across political communities, if several of these communities are perceived as coexisting contemporaneously, are separated by at least vaguely demarcated borders and maintain networks of relations. Legal norms can, on principle, be formulated for application in the world at

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[39] Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig, 1899), pp. 28-29 [new edn (Tübingen, 1907); reprint (Aalen, 1958)].

[40] Ibid., pp. 15-16. Georg Jellinek, *System der subjektiven öffentlichen Rechte* (Freiburg, 1892), p. 298.

[41] Georg Jellinek, *Allgemeine Staatslehre* (Berlin, 1900), pp. 394-434 [second edn (Berlin, 1905); third edn (Berlin, 1913); seventh reprint of the third edn (Bad Homburg, 1960)].

[42] Albert Bleckmann, *Allgemeine Staats- und Völkerrechtslehre. Vom Kompetenz- zum Kooperationsvölkerrecht* (Cologne, Berlin, Bonn and Munich, 1995), p. 113.

large or may at least be considered applicable, even though their enforceability may be perceived as limited. Political communities interrelated through legal norms have to recognise each other as autonomous, while this recognition does not have to prevent political communities from categorising their relations in terms of hierarchies and, thereby, legally unequal. By consequence, autonomy, historically defined as self-governing capability, is not identical with independence but simply implies the capability of political communities to act on their own behalf under international legal norms. Autonomous political communities can therefore be sovereign states without having to claim independence for themselves. Likewise, states can be sovereigns without having to exist as subjects under international law. The fusion of the concepts of autonomy and independence, constitutive of nineteenth- and twentieth-century international law, did not apply to any period prior to the nineteenth century.

Within this definition, international law is embedded in a tradition that may be older than the oldest existing written records of the third millennium BCE. However that may be, the tradition was in existence at the time when the earliest written records came into being.

International Legal Subjects, Mainly States, and the So-called International Legal Order

For about two hundred years, theorists of law and the social sciences have treated states as quasi-living persons, equipping them with "organs" and "wills".[43] Within this perspective, states have to be credited with the capacity of giving expression to their "wills" through their "organs", mainly legislative and executive institutions. Theorists, thus, have been compelled to assume that these "organs" are in existence in order to allow state "wills" to become explicit. However, according to theorists, states did not simply exist but were subject to the law of life and death. Hence, they had to postulate that there should be a "will" to establish states. But this "will" cannot exist, unless there is a state seemingly embodying it. Because of the lack of possibility to assigning priority either to the existence of the state or of a "will to establish a state", the influential nineteenth-century jurist and politician Carl Friedrich Wilhelm von Gerber (1823 – 1891)[44] arrived at the conclusion that processes of the establishment of states fall outside the province of jurisprudence. Gerber's opinion has continued to shape legal attitudes to processes of state-making far into the twentieth century[45] and has induced jurist to entrust these processes to scrutiny by historians.

Moreover, theorists have postulated that states as subjects under international law should be "actors" and that, as apparent "actors", states have been credited with operating as sovereigns in an arena where legal norms do not exist as givens. Theorists arrived at this postulate from the observation that there could not be any legitimate framework above sovereign and independent states for legal norms. Hence, nineteenth-century theorists argued that international law could not be accepted as a given, but that it had to result from purposeful human action condensed into state "wills". Theorists described this process of the purposeful setting of international legal norms as the combination of state "wills" to the end of setting an apparently objective "legal order" above states through "actions" of states as international legal subjects. Theorists envisaged the making of treaties among states as well as abidance by customary law as "actions" capable of performing this task.[46] However, this construction of the setting of international law immediately raised difficult questions. These questions concerned the conditions under which habits of state practice might turn into

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[43] Karl Heinrich Ludwig Pölitz, *Die Staatswissenschaft im Lichte unserer Zeit*, second edn, vol. 3 (Leipzig, 1828), pp. 18-19 [first published (Leipzig, 1824)]. Max von Seydel, 'Der Bundesstaatsbegriff', in: *Zeitschrift für die gesamte Staatswissenschaft* 28 (1872), pp. 185-256 [reprinted in: Seydel, *Staatsrechtliche und politische Abhandlungen* (Freiburg, 1893), pp. 1-89]. Friedrich Ratzel, *Politische Geographie*, third edn, edited by Eugen Oberhummer (Munich and Berlin, 1923), p. 434 [first published (Munich and Leipzig, 1897)].

[44] Carl Friedrich Wilhelm von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts*, second edn (Leipzig, 1869), pp. 1-3, 16-17 [first published (Leipzig, 1865); third edn (Leipzig, 1880); reprint of the third edn (Aalen, 1969)].

[45] Heinrich Triepel, *Staatsrecht und Politik* (Berlin, 1927), p. 9.

[46] Georg Jellinek, *Die rechtliche Natur der Staatsverträge. Ein Beitrag zur juristischen Konstruktion des Völkerrechts* (Vienna, 1880), p. 57.

binding legal norms, the derivation of the basic norm that treaties among states should be honoured, as well as the mechanism through which specific technical agreements, laid down in treaties among two or more governments of states, could be converted into generally binding legal norms. These questions were not new in the nineteenth century, but, within the contemporary theoretical framework positioning states as "actors", they raised specific problems. Perhaps the most crucial of these problems emerged from the demand that, with regard to the apparent rule-free arena of inter-state "actions", theorists could not position international law as a given but had to demand the making of some international legal community whose state members would cooperate for the purpose of setting the law. Theorists were unwilling to have such an international legal community constructed for humankind at large. Rather, they demanded that member states of the community should share a common culture. Hence, they could not regard international law as a set of legal norms per se valid for humankind, but had to maintain that international legal norms should be culturally specific. This theoretical precondition for the setting of international law appeared to be mandated on the ground that cooperation among state "wills" could only emerge from agreement about shared basic social values informing some international legal community. Nineteenth-century international legal theorists, jointly with practical political decision-makers, simply equated these shared basic social values with what they regarded as common in Europe. They drew the further conclusion that these basic values should be disseminated in other parts of the world, together with the postulated objective international legal order, if necessary through the use of military force. Some theorists, among them the Munich publicist Max von Seydel (1846 – 1901)[47] and the Berlin philosopher Adolf Lasson (1823 – 1917),[48] went further and claimed that there was no international law at all. Instead, they insisted that, among states, there nothing but the rule of force.

Perceptions such as these were not applicable before the beginning of the nineteenth century and could, even during that century, not be imposed easily outside Europe and America. Consequently, the international legal order, constructed as an objective set of legal norms in Europe, turned out as the expression of subjective quests for power by governments of some European states, when it came to be confronted with sets of legal norms current among Native Americans, in Africa, Asia and the South Pacific. Specifically during the decades around 1900, the demand for the acceptance of the international legal order served the ideological foundation of colonial rule. Nevertheless, historians of international law, among them Wolfgang Preiser (1903 – 1997)[49] and Karl-Heinz Ziegler[50] have taken for granted that, throughout history, the international legal order should be regarded as having to be based on some international legal community, and they assumed for themselves the task of reconstructing past international legal communities through historical research. But, in doing so, they merely imposed European international legal theory upon the rest of the world, rather than investigating the perceptions about legal norms above states specific to time and place.

With regard to Europe, the proposition that some international legal order can exist only within an international legal community is hardly traceable in extant sources prior to the nineteenth century. By contrast, there is an abundance of records testifying to the expectation that legal relations can come into existence and be maintained through treaties among ruling institutions in Europe, such as the city of Venice, and Muslim rulers, such as the Ottoman Turkish Sultan, without the stated requirement that the contracting parties should explicitly agree upon their acceptance of basic social values. Instead, the bindingness of the basic norm obligating signatories to honour treaties was taken

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[47] Max von Seydel, *Commentar zur Verfassungsurkunde für das Deutsche Reich*, second edn (Freiburg and Leipzig, 1897), pp. 31-32 [first published (Freiburg and Leipzig, 1873)].

[48] Adolf Lasson, *Princip und Zukunft des Völkerrechts* (Berlin, 1871), pp. 57-58, 62-63.

[49] Wolfgang Preiser, *Die Völkerrechtsgeschichte. Ihre Aufgaben und ihre Methode* (Sitzungsberichte der Wissenschaftlichen Gesellschaft der Johann-Wolfgang-Goethe-Universität Frankfurt/Main, 1963, nr 2) (Wiesbaden, 1963). Preiser, 'History of the Law of Nations. Basic Questions and Principles', in: Rudolf Bernhardt, ed., *Encyclopedia of Public International Law*, vol. 7 (Amsterdam, New York and Oxford, 1984), pp. 126-160.

[50] Karl-Heinz Ziegler, *Völkerrechtsgeschichte*, second edn (Munich, 2007) [first published (Munich, 1994)].

for granted as binding.[51] Likewise, there were few problems of formal procedure impeding upon the conclusion of binding agreements between European long-distance trading companies, such as the Dutch East India Company (VOC), and the Shōgun of Japan early in the seventeenth century.[52] For one, philosopher Baruch Spinoza (1632 – 1677), a near contemporary observer, thoroughly familiar with the VOC business practices, assumed that, on principle, every state could enter into treaty obligations with every other state, no matter where in the world, citing the Dutch-Japanese agreements as evidence.[53] Spinoza's judgment is remarkable, because he denied the binding force of the law among states on principled grounds, and still took for granted that there were basic legal norms about treaties among states. According to seventeenth-century theorists, then, these norms were in existence, applicable and valid, even though they did not result from the activities of any international legal community, and were not in need of any specifiable international legal order.

Might and Right, War and Peace

The discussion of the postulate of some international legal order above states already touches upon the problem of the relationship between might and right in inter-state relations. That relationship is complex, not only because, as has often been claimed, might makes right, but also and more importantly, because the enforcement of the law can demand the use of force. Yet, the reverse is also the case, namely that the use of force, even in war, presupposes the existence of law. With regard to international legal norms, the interdependence between might and right has boosted the expectation that the maintenance and restoration of peace may demand the use of military force, while at the same time it is hardly possible to theoretically conceive of and to provide empirical evidence for the conduct of war without any application of the law.

However, discourse about war and peace has, in Europe, been tied to the use of metaphors positioning war and peace in different if not opposite sphere of life. Thus war breaks out, as if it is a prisoner. Peace gets concluded, as if it is a door, and gets broken, as if it is a piece of wood. Metaphors used in language translate into models of thinking, thereby conveying meaning. War then appears as a quasi-living creature, peace as a dead matter. These metaphors are old, go back to Greek and Roman Antiquity and, consequently, are in common European usage. To Carl von Clausewitz (1780 – 1831),[54] war appeared winnable solely to the party fighting the "main battle" (Hauptschlacht) under extreme tension. The times of peace, which he expected to begin, appeared to Francis Yoshihiro Fukuyama (1952 -) as dead as the "end of history".[55] Whoever associates war with life and movement, but peace with death and motionlessness, takes the view that war and peace consist of different or even opposing patterns of action. The supposition applies even if the mantra gets repeated over and over again that peace is more than the absence of war but is equivalent of the

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[51] Treaty Mehmed II., Sultan – Venice, 25 November 1479, edited by Franz Miklosich and Joseph Müller, *Acta et diplomata Graeca res Graecas Italasque illustrantia* (Acta et diplomata Graeaca medii aevi sacra et profanas, 3) (Vienna, 1865), pp. 302-306 [reprint (Vienna, 1968)].

[52] Privilege in the Name of Ieyasu Tokugawa, Shōgun of Japan, for the Dutch East India Company (VOC), 25.August 1609, in: Jan Ernst Heeres, ed. *Corpus diplomaticum Neerlando-Indicum*, part 1 (Bijdragen tot de Taal-, Land- en Volkenkunde van Nederdisch-Indië, 87) (The Hague, 1931), pp. 69-70; also in: Ulrich Gerard Lauts, *Japan in zijne staatkundige en burgerkijke inrigtingen en het verkeer met Europesche natiën* (Amsterdam, 1847), pp. 171; renewed, 15 September 1617, in: Heeres (as above), p. 133.

[53] Baruch Spinoza, *Tractatus theologico-politicus* [1670], edited by Carl Gebhardt, Spinoza, *Opera*, vol. 3 (Heidelberg, 1925), p. 200 [reprint of the edn by Gebhardt (Heidelberg, 1972); newly edited by Günter Gawlick and Friedrich Niewöhner, Spinoza, *Opera*, vol. 1 (Darmstadt, 2008)].

[54] Carl von Clausewitz, *Vom Kriege*, (Frankfurt, Berlin and Vienna, 1980, pp. 200) [fourth edn of this edn (Berlin, 2003); first published, edited by Marie von Clausewitz (Berlin, 1832); sixteenth edn, edited by Werner Hahlweg (Bonn, 1952); nineteenth edn (Bonn, 1980); reprint of this edn (Bonn, 1991); English version by Michael Howard and Peter Paret (Princeton, 1976)].

[55] Francis Yoshihiro Fukuyama, *The End of History and the Last Man* (London, 1992).

"regulated cooperation or the progressive integration of groups".[56] According to a firm European belief, East Asia has not been the home of peace theories at all. Instead, China ranks as the hoard of military theory and as the birth place of revolutionary weapons technology, such as firearms.[57] Likewise, Japan has been seen as the engine of the aestheticisation of war through its fusion of Zen with martial arts.[58] Peace, according to a standard European perception, should have resulted in East Asia either through the use of force or through pragmatic ad hoc-accommodation, without requiring a theory of its own.[59] Peace, it has been surmised, has come into existence in East Asia through intermediation by high-ranking persons, without pressure issued by superior institutions and without requiring a global eschatological or teleological perspective. However, these European perspectives have little in common with the actual condition of reflections on war and peace in East Asia.

By contrast, yet in congruence with the varying metaphors, theories of war and peace have, indeed, appeared in different textual genres in Europe and in East Asia. In Europe, much of what gets subsumed into international relations theory at present, was draped into numerous peace treatises, *querelae pacis* (complaints of peace) and programs for perpetual peace from the thirteenth to the eighteenth century, in the works of such authors as Dante Alighieri (1265 – 1321),[60] Andrea Biglia (c. 1394 – 1435),[61] Jean Jacques Rousseau (1712 – 1778)[62] and Immanuel Kant (1724 – 1804).[63] Choosing these genres made sense, because international relations theories, in the course of these centuries, aimed at outlining the conditions for the preservation of the stability of the world. These theories could propagate perpetual peace because, in contradistinction against their nineteenth- and twentieth-century successors, they were not embedded in discourses about war as an engine for the promotion of change. European peace theories of that period, thus, had a distinct impact of their own on international relations theories, irrespective of their precise statements and goals, in that they focused these theories on the maintenance or restoration of the *status quo ante*. Put differently: It is not useful to engage in controversy over the issue whether a certain program for perpetual peace is useful or naive. Rather, it is more important to scrutinise the specific effects, which the demand can have had in its own time that political action should be directed towards the accomplishment of perpetual peace as the state of the absence of war.

By contrast, in East Asia, peace theories have long been anchored in treatises featuring theories of war. Already this formality shows that the European perception of an apparent opposition of concepts and patterns of action relating to war and peace is far from self-evident. Instead, this

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[56] Karl Dietrich Bracher, 'Frieden und Krieg', in: Bracher and Ernst Fraenke, eds, *Das Fischer Lexikon*, vol. 7 (Frankfurt, 1969), pp. 108-119, at p. 110. Jörg Fisch, *Krieg und Frieden im Friedensvertrag* (Sprache und Geschichte, 3) (Stuttgart, 1978), p. 1. Dieter Senghaas, *Zum irdischen Frieden. Erkenntnisse und Vermutungen* (Frankfurt, 2004), pp. 17-24.

[57] John King Fairbank and F. A. Kierman, eds, *Chinese Ways of Warfare* (Cambridge, MA, 1974). David Andrew Graff, *Medieval Chinese Warfare. 300 – 900* (London, 2002). Joseph Needham, *Military Technology. The Gunpowder Epic* (Needham, Science and Technology in China, vol. 5, part 7) (Cambridge, 1986).

[58] Eugen Herrigel, *Zen in der Kunst des Bogenschießens* (Constance, 1948) [45th edn (Frankfurt, 2004)]. George Cameron Hurst, III, *Armed Martial Arts of Japan. Swordsmanship and Archery* (New Haven and London, 1998).

[59] *Sensō to heiwa no chūkinsei-shi* (Rekishigaku no genzai, 7) (Tokyo, 2001).

[60] Dante Alighieri, '[Letter to Emperor Henry VII]', edited by Giorgio Brugnoli, in: Dante, *Opere minori*, vol. 2 (Milan and Naples, 1979), pp. 562-572.

[61] Andrea Biglia, Querellae pacis [c. 1423-1424]. Ms. Milan: Biblioteca Ambrosiana, Cod. Ambr. N 280, sup.

[62] Jean-Jacques Rousseau, 'Extrait du Projet de paix perpétuelle de M. l'Abbé de Saint-Pierre', in: *The Political Writings of Jean Jacques Rousseau*, edited by Charles Edwyn Vaughan, vol. 1, reprint (Oxford, 1962), pp. 364-396 [first publication of Vaughan's edn (Cambridge, 1915); first English edn in: *The Works of Jean-Jacques Rousseau*, vol. 10 (Edinburgh, 1774), pp. 182-191; also edited by Charles Edwyn Vaughan, *Rousseau, A Lasting Peace Through the Federation of Europe* (London, 1917), pp. 5-35; also edited by E. M. Nuttall, *Rousseau, A Project of Perpetual Peace* (London, 1927); also in: Murray Greensmith Forsyth, Harold Maurice Alvan Keens-Soper and Peter Savigear, eds, *The Theory of International Relations* (London, 1970), pp. 127-180; also in: Stanley Hoffman and David P. Fidler, eds, *Rousseau on International Relations* (Oxford, 1991), pp. 53-100; also in: Moorhead Wright, ed., *The Theory and Practice of the Balance of Power* (London and Totowa, 1975), pp. 74-80].

[63] Immanuel Kant, 'Zum ewigen Frieden [zuerst. Königsberg 1795]', in: Kant, *Werke in zwölf Bänden*, edited by Wilhelm Weischedel, vol. 11 (Frankfurt, 1968), pp. 193-251.

perspective should be supplemented with the expectation that war and peace might be conceptually inseparable. European peace theories impose peace as the goal of action. The European postulate that peace should be recognised as something totally different from war, both being mutually incompatible, is already at first sight tied to specific patterns of actions and the theories of actions behind them. According to these European theories, actions must occur in pursuit of a goal, if they are to be acknowledged as rational.[64] By contrast, East Asian theorists did not take the position that war as a dynamic process has to be placed in fundamental opposition against peace as a static condition, but took both war and peace to be the result of actions focused on adherence to due process (Chinese *dáo*, Japanese *dō*) rather than goal-attainment. These theories thus put on record a tradition of thinking about peace in East Asia. Indeed, already the Ancient Chinese textual tradition integrated statements about peace into theories of war, and similar records continued to exist to the very end of the nineteenth century.[65]

While in East Asia, the tradition of integrating the theory of peace into the theory of war remained active until the nineteenth century, a change of perception took place in Europe concerning the correlation of the mutually opposed patterns of action applied in war and peace. Up until the end of the eighteenth century, European theorists accepted peace as the normal condition of the divinely ordered world, admitted that peace might be temporarily interrupted, but could be lifted through resort to war. By contrast, American and European theorists of the nineteenth and twentieth centuries took for granted the premise that war was the normal condition of the world, which they no longer were ready to perceive as divinely ordered, conceded that peace could temporarily interrupt war and expected that a new war would occur after a span of time of short duration. St Augustine, Bishop of Hippo Regius in North Africa (354 – 430), had provided the authoritative theoretical explication for the older paradigm of the sequence of peace, war and again peace,[66] which mainly Clausewitz replaced by the new paradigm of the sequence of war, peace and again war.[67] The mutually exclusive paradigms have formed the basis for definitions of what has respectively been categorised as the law of war and peace, the law among states and international law. On the basis of the older, Augustinian paradigm, international legal theorists posited the law of war and the law among states as part of the divinely willed world order, which they considered not to be in need of positive human action. But on the basis of the younger, Clausewitzian paradigm, theorists have demanded positive human action to the end of setting international law, including norms regulating the public law of treaties among states. Within the older paradigm, international legal norms could be regarded as enforceable, if and as long as human being acted reasonably and implemented divine will. Yet within the new paradigm, the question of how international legal norms could be rendered enforceable turned into the most fundamental of international legal problems, the solution of which might even require the use of force by governments of states. Thereby, international law has come under the wings of power politics. No such change of paradigm has ever occurred endogenously elsewhere in the world.

Connecting with the metaphoric of live and death, the predominance of the Clausewitzian paradigm in America and Europe and the globalisation of this paradigm in the course of the nineteenth and twentieth centuries have widened the gap between the fields of activity of groups of professionals seen as entrusted with the maintenance of peace on the one side and, on the other, groups of professionals seemingly in charge of the conduct of war. To jurist and political scientist

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[64] Max Weber, *Wirtschaft und Gesellschaft*, book I, § 1, section 1-2**,** fifth edn, edited by Johannes Winckelmann (Tübingen, 1980), pp. 1-2 [first published (Tübingen, 1922)]. Uncritically adopted and popularised in: Talcott Parsons, Edward Albert Shils and James Olds, 'Categories of the Orientation and Organization of Action', in: Parsons and Shils, eds, *Toward a General Theory of Action* (Cambridge, MA, 1959), p. 53-109, at p. 53.

[65] Ralph D. Sawyer, *The Art of the Warrior. Leadership and Strategy from the Chinese Military Classics* (Boston and London, 1996), pp. 101-102. Inazō Nitobe, *Bushidō. The Soul of Japan. An Exposition of Japanese Thought* new edn based on the tenth edn of 1905, edited by George M. Oshiro (Tokyo 2002), pp. 52-53, 94-95 [first published (Tokyo, 1900 [= 2560]); further contemporary edn (Philadelphia, 1900); most recent edn in microform (Tokyo, 2014)].

[66] Augustine of Hippo, *De civitate Dei*, edited by Bernard Dombart and Alphons Kalb, chap. XIX/3, nr 7, 11-44, vol. 2 (Corpvs Christianorvm. Series Latina, 48) (Turnhout, 1955), pp. 663, 671-672, 674-682.

[67] Clausewitz, *Krieg* (note 54), edn of 1980, pp. 235-236.

Nicholas Greenwood Onuf (1941 -), the diplomatic service, whose members he identified as the professional makers and preservers of peace, were fettered by archaic and apparently useless rituals, while professional soldiers were ready to promote change and to apply the seemingly most up-to-date technologies in war.[68] Like recent historians and theorists of diplomacy,[69] Onuf thus associated the doings of diplomats with peace as a static condition and the actions of soldiers with war as a dynamic process. However, this schematic distribution of roles is everything but self-evident. While recalling ambassadors from their posts upon the declaration of war has been habitual for about 150 years, this habit has never implied that diplomats should have remained inactive, while war is ongoing. Quite on the contrary, the practice of launching diplomatic soundings soon after the beginning of fighting with the goal of arranging for a truce, has been on record since the seventeenth century at the latest.[70] Likewise, although the regular employment of diplomats in peace negotiations is well attested, professional soldiers did serve as peace-makers as well, among them Tsunenaga Hasekura (1571 – 1622), the professional warrior dispatched from Japan on a diplomatic mission,[71] and the military officer Max August Scipio von Brandt (1835 – 1920),[72] who served as Prussian, later German diplomatic envoy in East Asia. Moreover, in view of the well recorded basic changes of the public law of treaties among states as well as the equally fundamental transformation of the practice of the conclusion of treaties, the claim is difficult to maintain that diplomats have stuck to empty rituals. At the very least, this claim is irreconcilable with the equally well documented fact that rituals can change and be employed in different ways to serve varying political goals and interests,[73] thereby testifying to the creativity of diplomatic practice. With regard to the professionalism of soldiers, specifically Clausewitz's work provides ample record of the orientation of military planning upon past experiences, that is, the traditionalism of the military. Specifically in East Asia, a theory of war existed to the beginning of the nineteenth century, according to which the need of the use of weapons under the goal of implementing a ruler's decision was not equated with victory, but as defeat of professional warriors. For one, Chozan Issai (1659 – 1741), who was both a military professional and a theorist of war and peace, demanded in early eighteenth-century Japan that soldiers should display their professionalism by preventing the outbreak of violence through their very presence instead of resorting to arms.[74] The Ancient Chinese treatise *Tai Kung's Six Secret Teachings* (eleventh century BCE) already pointed into the same direction stating that a general was useless as a warrior, if he had to fight a battle.[75]

In sum, the schematic ascriptions of the maintenance and restoration of peace to the doings

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[68] Nicholas Greenwood Onuf, *World of Our Making* (Columbia, SC, 1989), pp. 248-249.

[69] Lucien Bély, *L'Art de la paix en Europe. Naissance de la diplomatie moderne XVI – XVIIIe siècle* (Paris, 2007). Keith Hamilton and Richard Langhorne, *The Practice of Diplomacy* (London and New York, 1995), p. 1. James Brown Scott, 'The Development of Modern Diplomacy', in: Edmund Aloysius Walsh, SJ (Hrsg.), The History and Nature of International Relations (New York, 1922), pp. 93-129. Jose Calvet de Magalhães, *The Pure Concept of Diplomacy* (Westport, CT, 1988), p. 9 [first published (Colleção ensaios e documentos. N. S., 22) (Lisbon, 1982)]. Iver B. Neumann, *"At Home with the Diplomats". Inside a European Foreign Ministry* (Ithaca, 2012).

[70] Christoph Kampmann, 'Peace Impossible? The Holy Roman Empire and the European State System in the Seventeenth Century', in: Olaf Asbach and Peter Schröder, eds, *War, the State and International Law in Seventeenth-Century Europe* (Farnham, SY, 2010), pp. 197-210.

[71] *Rōma no Hasekura Tsunenaga to Nanban Bunka. Nichi-ō kōryū. 16 – 17 seiki* (Sendai, 1989).

[72] Maximilian August Scipio von Brandt, Dreiunddreißig Jahre in Ostasien, 3 vols (Leipzig, 1901) [new edn (Leipzig, 1909); partly reprinted and edited in: Catharina Blomberg, *The West's Encounter with Japanese Civilization. 1800 – 1940*, vol. 11 (Richmond, SY, 2000); reprint (Kŭnse Tong Asea Sŏvangŏ Charvo Ch'angsŏ, 93) (Seoul, 2001)].

[73] Gerd Althoff, 'Die Veränderbarkeit von Ritualen im Mittelalter', in: Althoff, ed., *Formen und Funktionen öffentlicher Kommunikation im Mittelalter* (Vorträge und Forschungen, herausgegeben vom Konstanzer Arbeitskreis für mittelalterliche Geschichte, 51) (Sigmaringen, 2001), pp. 157-176 [English version in: Althoff, Johannes Fried and Patrick J. Geary, eds, *Medieval Uses of the Concept of the Past* (Cambridge, 2002), pp. 71-87].

[74] Chozan Issai, 'Neko no myōjutsu [The Eerie Skill of the Cat]', edited by Ichirō Watanabe, *Budō no meicho* (Tokyo, 1979), pp. 10-16. For an English summary see: Karl Friday, 'Beyond Valor and Bloodshed. The Arts of War as a Path to Serenity', in: Rosemarie Deist and Harald Kleinschmidt, eds, *Knight and Samurai* (Göppinger Arbeiten zur Germanistik, 707) (Göppingen, 2003), pp. 1-13.

[75] Sawyer, *Art* (note 65), pp. 101-102.

of diplomats on the one side, the conduct of war to soldiers on the other side, have as little in their support as the claims that diplomats merely observe static rituals, while soldiers are prone to innovation. War and peace, therefore, do not have to be considered as mutually exclusive. In terms of the history of international law, this statement suggests that, on the one side, neither peace nor war are thinkable without respect for legal norms, while, on the other side, neither war nor peace can be goals of practical action without resort to force. The changes of the relationship between might and right, therefore, is a core issue of the history of international law.

History of the Historiography of International Law

The historiography of international law thus focuses on change of the conflict between might and right in the context of the transformation of the paradigm of the sequence of war and peace. However, the consciousness that there a history of international law in this sense is specific to Europe and, even there, a recent phenomenon, relative to the long recording of writings on international law. In as far as these records went beyond arguments concerning the prospect of perpetual peace they were limited to pragmatic writings up until the turn towards the fifteenth century, comprising legal texts such as agreements among political communities and statements relating to the conduct of war. These texts have at times been supplemented by reports on activities under international legal norms, as recorded in general historiographical writings mainly on treaty negotiations and about controversies over the justice of wars. The theoretical literature reflecting on the law of war and peace, arising in Europe during the fifteenth century, stood under the prevailing intention of its authors, foremost among them the theologian Francisco de Vitoria (born as Francisco de Arcaya y Compludo, um 1483 – 1546) and the jurist Hugo Grotius (1583 – 1645), to base their theoretical arguments about war and peace upon examples drawn from the Holy Scriptures as well as a wide range of theological philosophical and historical writings from Greek and Roman Antiquity.

The logic informing this type of argument followed from the underlying belief in the continuity of the divinely willed world order. Encouraged by this belief, authors assumed that textual evidence, gleaned not merely from the Bible but also from the writings of theological and lay authors, could support their theoretical deductions irrespective of the time of their composition. Consequently, fifteenth-, sixteenth- and seventeenth-century theorists could treat examples recorded in texts of considerable age as recent empirical material, whereby the Bible as believed divine revelation provided evidence recognised as superior to all other authorities. Only during the second half of the seventeenth century, when intellectuals such as the Leiden historian Georg Horn (1620 – 1670) began to document an epochal break between the Ancient Greek and Roman world, as what they termed "ancient" history, and their own time,[76] surveys appeared about the contents of older writings, which were no longer considered to have a direct bearing on "recent" history and the present and, therefore, seemed to require critical editorial work and commentary. Contemporary ordering schemes for libraries entered these surveys under the rubric *Historia Litteraria*. Early in the eighteenth century, *Historia Litteraria* began to comprise writings pertaining to the law of war and peace as well as the law among states, thereby forming the beginning of the historiography of international law. Jurist Nicolaus Hieronymus Gundling (1661 – 1729) at Halle,[77] natural law theorist Johann Jacob Schmauß (1690 – 1757) at Göttingen,[78] Saxon government Counsel Adam Friedrich Glafey (1692 – 1753) at Dresden[79] and jurist Christian Friedrich Georg Meister (1718 –

[76] Georg Horn, *Introductio ad historiam universalem* (Leipzig, 1699) [first published (Amsterdam, 1677)].

[77] Nicolaus Hieronymus Gundling, *Vollständige Historie der Gelahrtheit*, 5 vols (Frankfurt and Leipzig, 1734-1736), vol. 3, pp. 3246-3264, 3301-3333.

[78] Johann Jacob Schmauß, *Historie des Rechts der Natur* (Schmauß, Neues System des Rechts der Natur, vol. 1) (Göttingen, 1754).

[79] Adam Friedrich Glafey, *Vollständige Geschichte des Rechts der Vernunft, worin die in dieser Wissenschaft erschienenen Schriften nach ihrem Inhalt und wahren Wert beurteilt werden. Nebst einer Bibliotheca juris naturae et gentium* (Leipzig, 1739), pp. 21-288, 291-416 [reprint (Aalen, 1965)].

1782) at Göttingen[80] compiled early comprehensive surveys of international legal *Historia Litteraria*. Cameralist Joachim Georg Darjes (1714 – 1791),[81] first at Jena, then at Frankfurt on the Odra and jurist Daniel Nettelbladt (1719 – 1791) at Halle[82] provided brief summaries of what they considered as essential writings on international legal issues. In a second step, *Historia Litteraria* relating to these issues split up at the end of the eighteenth century into the textual genres of the annotated bibliography of publications, represented in the monumental work by Dietrich Heinrich Ludwig von Ompteda (1746 – 1803),[83] and the descriptive history of theory and practice, for which the monograph of lawyer-politician Robert Plumer Ward (1765 – 1846)[84] stands.[85] The latter approach formed a new standard which US diplomat Henry Wheaton (1785 – 1848) transmitted into the nineteenth century. Wheaton carried his *History of the Law of Nations* to 1842 with a focus on the period since 1648.[86] In view of the substantial contribution from early eighteenth-century "literary" historians to the historiography of international law, it is inappropriate to claim that international legal historiography set in only with Ward.[87]

During the nineteenth century, some theorists started to introduce their work with short overviews of the history of international law. For one, Wheaton prefixed such an overview to his handbook of international law, first published in 1836.[88] In the second half of the nineteenth century, the Heidelberg publicist Johann Caspar Bluntschli (1808 – 1881) followed Wheaton's precedence.[89] After Ward, a survey of 1848 treated only Antiquity[90] and a comprehensive eighteen-volume series followed describing international law within the history of relations among states from Antiquity to

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[80] Christian Friedrich Georg Meister, *Bibliotheca ivris naturae et gentium* (Göttingen, 1749).

[81] Joachim Georg Darjes, *Observationes ivris naturalis, socialis et gentium ad ordinem systematis svi selectae* (Jena, 1751). Darjes, *Institutiones jurisprudentiale universalis*, new edn (Frankfurt and Leipzig, 1754) [first published in: *Philosophischer Büchersaal* 1 (1742), pp. 520-542, 646-656].

[82] Daniel Nettelbladt, *Systema elementare universae Ivrisprvdentia natvralis*, part I, section II (Halle, 1757), pp. 11-28.

[83] Dietrich Heinrich Ludwig von Ompteda, *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts*, 2 vols (Regensburg, 1785) [vol. 3, supplemented by Karl Christoph Albert Heinrich von Kamptz (Regensburg, 1817); reprint (Aalen, 1963-1965)].

[84] Robert Plumer Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe since the Time of the Greeks and Romans to the Age of Grotius*, 2 vols (London, 1793) [reprint (New York, 1973)].

[85] With regard to research about the state, the same transformation took place in the second half of the eighteenth century. See: Johann Georg Meusel, *Lehrbuch der Statistik* (Leipzig, 1752). Meusel, *Literatur der Statistik* (Leipzig, 1790).

[86] Henry Wheaton, *History of the Law of Nations in Europe and America* (New York, 1845), pp. 69-758 [reprints (New York, 1973); (Buffalo, 1982)].

[87] This is the view taken, among others, by: Arthur Nussbaum, *A Concise History of the Law of Nations*, second edn (New York, 1954), p. 291 [first published (New York, 1947); reprint (New York, 1950)]. Antonio Truyol y Serra, 'Geschichte der Staatsverträge und Völkerrecht', in: René Marcic and Hermann Mosler, eds, *Internationale Festschrift für Alfred Verdross* (Munich, 1971), pp. 509-522, at p. 513. Truyol y Serra, *Histoire du droit international public* (Paris, 1995), p. 93.

[88] Henry Wheaton, *Elements of International Law*, English edn, third edn, edited by Alexander Charles Boyd (London, 1889), pp. 5-22 [first published (London and Philadelphia, 1836); third edn (Philadelphia, 1846); new edn by William Beach Lawrence (Boston, 1855); second edn of the edn by Lawrence (Boston and London, 1863); eighth edn, edited by Richard Henry Dana (Boston and London, 1866), vol. 1, § 13, pp. 18-19; new English edn, edited by Alexander Charles Boyd (London, 1878); second edn of the edn by Boyd (London, 1880); third edn of the edn by Boyd (London, 1889); fourth English edn, edited by James Beresford Atlay (London, 1904); fifth English edn, edited by Coleman Phillipsen (London, 1916); sixth English edn, edited by Arthur Berriedale Keith (London, 1929); reprint of the original edn (New York, 1972); reprint of the edn by Dana, edited by George Crafton Wilson (Oxford, 1936); reprint of this edn (New York, 1972); reprint of the first ed by Dana (New York, 1991)].

[89] Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisierten Staten* (Nördlingen, 1868), pp. 12-20 [second edn (Nördlingen, 1872); third edn (Nördlingen, 1878)].

[90] Mauritius Müller-Jochmus, *Geschichte des Völkerrechts im Alterthum* (Müller-Jochmus, Das allgemeine Völkerrecht, part 1) (Leipzig, 1848).

the nineteenth century.[91] The Cambridge librarian Thomas Alfred Walker (1862 – 1935) prepared a new general description that came out in 1899,[92] and Arthur Wegner (1900 – 1989) published another short survey as the first part of a comprehensive handbook of international law in 1936.[93] Under the impression of World War I, jurist Robert Redslob (1882 – 1962) placed his survey under the four "principles" of the mandatory bindingness of treaties, the freedom and equality of as well as the solidarity among states and posited that these had been the essential guidelines for the making and implementation of international law throughout history.[94] Before the end of World War II, Wilhelm Georg Carl Grewe (1911 – 2000), first teaching international law at the University of Kiel, then moving into the West German diplomatic service, finalised his study of the history of international law since about 1500, but this work became available in a book trade edition only in 1984.[95] A further general description, appearing in 1951, did not continue the narrative beyond 1815.[96] Like Grewe, Arthur Nussbaum (1877 – 1964), raised in Germany, later teaching public law at Columbia University, touched briefly upon the history of the law of war and peace before 1500, while focusing on the Modern Age,[97] and attached a short review of the historiography of international law.[98] The *Oxford Handbook on the History of International Law* provides a further review of the historiography.[99]

The comprehensive late eighteenth-century and subsequent descriptions of the history of international law shared an overall concern for texts originating from the Mediterranean area and Europe, while relevant Arabic texts were treated at best in brief[100] and Chinese texts not at all. This narrow focus is remarkable as the older *Historia Litteraria* did already take notice of Confucius's writings[101] and Muslim theories of the law of war and peace received in-depth comments early in the eighteenth century.[102] Moreover, US missionary William Alexander Parsons Martin (1827 – 1916), working in China, summed up the essentials of the Chinese tradition of the law of war and peace in a presentation at the Berlin Congress of Orientalists of 1881.[103] The core work *Lī kī*, reportedly drawn on Confucius's teachings, has been available in an English version in 1885.[104] Special studies on the Chinese tradition of the law of war and peace were published in European languages early in the twentieth century,[105] on the Arabic tradition from the 1950s.[106] Last but not

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[91] François Laurent, *Histoire du droit des gens et des relations internationales*, 18 vols (Paris, 1850-1870) [new edn of vols 1-4 (Paris, 1855-1861); second edn of vols 1-4 (Paris, 1861-1863); second edn of vols 6, 7 (Brussels, 1865); new edn of vols 1-4 (Paris, 1879-1880)].

[92] Thomas Alfred Walker, *A History of the Law of Nations* (Cambridge, 1899).

[93] Arthur O. Rudolf Wegner, *Geschichte des Völkerrechts* (Handbuch des Völkerrechts, 1) (Stuttgart, 1936).

[94] Robert Redslob, *Histoire des grands principes du droit international depuis l'Antiquité jusqu'à la veille de la grande guerre* (Paris, 1923, pp. 17-41.

[95] Wilhelm Georg Carl Grewe, *Epochen der Völkerrechtsgeschichte*, second edn (Baden-Baden, 1988) [first unpublished print (Leipzig, 1945); first book trade edn (Baden-Baden, 1984); English version (Berlin, 2000)].

[96] Georg Stadtmüller, *Geschichte des Völkerrechts* (Hanover, 1951).

[97] Nussbaum, *History* (note 87).

[98] Ibid., pp. 291-295.

[99] Martti Antero Koskenniemi, 'A History of International Law Histories', in: Bardo Fassbender and Anne Peters, eds, *The Oxford Handbook of the History of International Law* (Oxford, 2012), pp. 943-971.

[100] Thus in: Slim Laghmani, *Histoire de droit des gens du jus gentium impérial au jus publicum europeum* (Paris, 2004), pp. 16-18.

[101] Glafey, *Geschichte* (note 79), § 93, pp. 72-77. Johann Friedrich Weidler, *Institutiones juris naturae et gentium* (Wittenberg, 1731), p. 31.

[102] Adriaan Reelant, *De religione Mohammedica libri duo* (Utrecht, 1705) [English version (London, 1712)].

[103] William Alexander Parsons Martin (= Wei-Liang Ding), 'Traces of International Law in Ancient China', in: *Verhandlungen des 5. Internationalen Orientalisten-Congresses*, vol. 2 (Berlin, 1881), pp. 71-78 [reprinted in: *The International Review* 14 (1883), pp. 63-77; also published as: 'Traces of International Law in China', in: *The Chinese Recorder* 14 (1883), pp. 380-393].

[104] *Lī kī* (note 26).

[105] Chan Nay Chow, *La doctrine du droit international chez Confucius* (Paris, 1941). Do-Yün Ma, *Der Eintritt des Chinesischen Reiches in den völkerrechtlichen Verband*. LLD Thesis (University of Berlin, 1907). Tchoan-Pao Siu

least, attempts have been made to reconstruct South Asian theories on the law of war and peace, essentially on the basis of the *Arthaśāstra* ascribed to Kautilya, minister under the Maurya ruler Chandra Gupta (340 BCE – 298 BCE), even though this work may be of more recent date.[107]

Among the various surveys that have appeared since the nineteenth century, Grewe's detailed description has risen to textbook level, even though it is mainly concerned with European legal issues since the sixteenth century and its author employed Nazi ideology during the 1930s.[108] Thus, Grewe came under the influence of German jurists determined to "combat" the Treaty of Versailles of 1919, most notoriously Carl Schmitt (1888 – 1985),[109] some of whose doctrines about international law Grewe borrowed.[110] Grewe partitioned his work according to time periods, which he chose to term "epochs". However, he did not use these "epochs" instrumentally as devices for dating and analysing source texts together with the theories and practical actions recorded therein. Rather, he treated his "epochs" materially as if they were integral elements of international law itself. In doing so, Grewe took for granted, without adducing supportive evidence, that the "epochs" he was retrospectively imposing upon the texts under his review were in themselves original elements of the past. He derived the names for his "epochs" from the names of four states, each of which he ranked as having dominated international politics in Europe for a certain period, approximately a century. According to this criterion, he constructed a sequence of "epochs", beginning with the "Spanish" in the sixteenth, continuing with the "French" in the seventeenth, followed by the "English" in the nineteenth and the "American" in the twentieth century. However, Grewe himself admitted that his epochal names were nowhere recorded in their own times. Neither theorists nor practical political decision-makers could, in their own time be aware that they were acting in some "Spanish", "French", "English" or "American" "epoch". Whereas Grewe might have claimed for his "Spanish epoch" that some sixteenth-century theorists of the law of war and peace, such as Vitoria or Francisco Suárez (1548 – 1617), were living and working in Spain, even that argument was not possible for the subsequent "epochs". During the so-called "French epoch", influential theorists were of Dutch origin, while during the so-called "English epoch" publications by German authors were most widely received and works by British authors dominated the so-called "American epoch".

Consequently, Gießen legal historian Heinhard Steiger has rightly criticised Grewe's "epochs" doctrine for its bias in favour of power politics, as Grewe drew the distinctive criteria for his "epochs" from state power and not from law.[111] Despite this criticism, Grewe's "epochs"

[= Xu], *Le droit des gens et la Chine antique* (Paris, 1926). For later studies see: Gerd Kaminski, *Chinesische Positionen zum Völkerrecht* (Berlin, 1973). Stefan Kroll, *Normgenese durch Re-Interpretation. China und das europäische Völkerrecht im 19. und 20. Jahrhundert* (Studien zur Geschichte des Völkerrechts, 25) (Baden-Baden, 2012). Rune Svarverud, *International Law and World Order in Late Imperial China. Translations, Reception and Discourse. 1840 – 1911* (Sinica Leidensia, 78) (Leiden, 2007).

[106] Mohammad Talaat al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (The Hague, 1968). Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore, 1955). Hans Kruse, *Islamische Völkerrechtslehre*, second edn (Bochum, 1979) [first published as: *Der Staatsvertrag bei den Hanefiten des 5./6. Jahrhunderts d. H. (11./12. Jh. n. Chr.)*. LLD Thesis (University of Göttingen, 1953)]. Ahmed Rechid, 'L'Islam et le droit des gens', in: *Recueil des cours* 60 (1937, part II), pp. 371-506. Ameur Zemmali, *Combattants et prisonniers de guerre en droit islamique et en droit international humanitaire* (Paris, 1997) [first published as LLD Thesis, typescript (University of Geneva, 1994)].

[107] For studies see: Nibaron Chandra Banerji [Banerjee], *Völkerrecht und Kriegsrecht im alten Indien* (Cologne, 1935). Pramathanath Banerji [Banerjee], *International Law and Custom in Ancient India* (Kolkatta, 1920) [also in: *Journal of the Department of Letters. University of Calcutta* 1 (1920), pp. 201-361; reprint (Madya Pradesh, 1982)]. Sekharipuram Vaidyanatha Viswanatha, *International Law in Ancient India* (Mumbay, 1925).

[108] Wilhelm Georg Carl Grewe, 'Der Reichsbegriff im Völkerrecht', in: *Monatshefte für auswärtige Politik* 6 (1939), pp. 798-802 [not included in: Grewe, *Machtpositionen und Rechtsschranken* (Baden-Baden, 1991)].

[109] Carl Schmitt, *Land und Meer. Eine weltgeschichtliche Betrachtung* (Leipzig, 1942) [fourth edn (Stuttgart, 1954); reprints (Stuttgart 1993; 2001); (Cologne, 1981)].

[110] Grewe, *Epochen* (note 96), pp. 182-193.

[111] Heinhard Steiger, 'Probleme der Völkerrechtsgeschichte', in: Der Staat 26 (1987), pp. 103-126.

terminology has continued in use in German language publications,[112] restated even in an early twenty-first-century textbook.[113] By contrast, the usually brief surveys of the history of international law written in other languages have usually ignored Grewe's terminology.[114]

Supplementing the general surveys, an increasing number of detailed studies have been published, to which the *Journal of the History of International Law* has been open since 1998. Among others, legal historian Ernst Reibstein (1901 – 1966) published a number of detailed studies on international legal theory,[115] next to a voluminous interpretation of the work of major theorists of the law of war and peace, the law among states and international law.[116] A multi-volume collection of detailed studies, appearing in the Netherlands, covers histories of core special fields of international law.[117] Already in 1963, Wolfgang Preiser examined the methodology of the history of international law, but neither commented on the problems of the formation of "epochs" nor did he take into account specific issues relating to the methodology of historical inquiries.[118] Jurist Vladimir Emmanuilovič Grabar (1865 – 1956), teaching at Tartu, returned to the tradition of the *Historia Litteraria* in a posthumously published bio-bibliographical study of Russian international legal literature.[119] Jurist Michel de Taube (1869 – 1961), teaching successively at the universities of St Petersburg and Munster, had already worked on Russian practice of international law, before studying Byzantine attitudes to the law of war and peace.[120] Public lawyer Andrea Rapisardi-Mirabelli, (1883 – 1946), and nationalist diplomat und jurist Mario Toscano (1908 – 1968), professor of the history of treaties under international law successively at the universities of Cagliari and Rome, likewise took up the *Historia Litteraria* tradition in their 1940 and 1968 compendia, in which they compared major treaty collections published since the sixteenth century.[121] Important deficits are remaining. Thus, the history of ideas informing the various branches and aspects of international law is poorly researched.[122] Also, while important detailed historical inquiries into

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[112] Oliver Diggelmann, 'The Periodization of the History of International Law', in: Bardo Fassbender and Anne Peters, eds, *The Oxford Handbook of the History of International Law* (Oxford, 2012), pp. 997-1011.

[113] Ziegler, *Völkerrechtsgeschichte* (note 50).

[114] Arthur Clement Guillaume Marie Eyffinger and Cornelis Huibert Bezemer, eds., *Compendium volkenrechtsgeschiedenis* (Deventer, 1989) [second edn (Deventer, 1991)]. Dominique Gaurier, *Histoire du droit international* (Rennes, 2005). Laghmani, *Histoire* (note 100). Truyol y Serra, *Histoire* (note 87).

[115] Ernst Reibstein, *Die Anfänge des neueren Natur- und Völkerrechts. Studien zu den „Controversiae illustres" des Fernandus Vasquius (1559)* (Bern, 1949), pp. 67-85. Reibstein, 'Neumayr von Ramsla als Völkerrechtsautor', in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 14 (1951), pp. 125-152. Reibstein, 'Pufendorfs Völkerrechtslehre', in: *Österreichische Zeitschrift für öffentliches Recht* 7 (1956), pp. 43-72. Reibstein, 'Das Völkerrecht der deutschen Hanse', in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 17 (1956/57), pp. 38-92. Reibstein, 'Die Völkerrechtskasuistik des Abbé de Mably', in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 18 (1957/58), pp. 229-260.

[116] Ernst Reibstein, *Völkerrecht. Eine Geschichte seiner Ideen in Lehre und Praxis*, 2 vols (Orbis academicus, series I, vols 5, 10) (Freiburg, 1958-1963).

[117] Jan Hendrik Willem Verzijl, ed., *International Law in Historical Perspective*, 12 vols in 15 parts (Nova et vetera iuris gentium. Series A, 4-19) (Leiden, 1968-1998).

[118] Preiser, *Völkerrechtsgeschichte* (note 49).

[119] Vladimir Emmanuilovič Grabar, *The History of International Law in Russia. 1647 – 1917. A Biobibliographical Study* (Oxford, 1990).

[120] Michel de Taube, 'Etude sur le développement historique du droit international dans l'Europe orientale', in: *Recueil des cours* 11 (1926, part I), pp. 341-535. Taube, 'L'apport de Byzance au développement du droit international occidental', in: *Recueil des cours* 67 (1939, part I), pp. 233-339.

[121] Andrea Rapisardi-Mirabelli, *Storia dei trattati e delle relazioni internazionali*, second edn (Manuali di politica internazionale, 21) (Milan, 1945) first published (Milan, 1940)]. Mario Toscano, *The History of Treaties and International Politics*, vol. 1, second edn (Baltimore, 1966), pp. 47-87 [first published (Turin, 1958)].

[122] Thus already: Michael Stolleis, 'Zur Ideengeschichte des Völkerrechts. 1870 – 1939', in: Lutz Raphael and Heinz-Elmar Tenorth, eds, *Ideen als gesellschaftliche Gestaltungskraft im Europa der Neuzeit. Beiträge für eine erneuerte Geistesgeschichte* (Muich, 2006), pp. 161-171, at p. 168.

aspects of historical aspects of peace treaties and the process of the "expansion",[123] eighteenth- and nineteenth-century theories of war,[124] the structural history of diplomacy[125] and the history of just war theories[126] are available, a general history of international law on the basis of historical methodology is lacking.

Principles Underlying the Following Narrative

The following description shall rest on the following principles:

1. The history of international law is neither part of world history nor its abridgment. Instead, it deals with a concise aspect of the past, which, however, is intertwined with other aspects. World historical processes need to be reconstructed in retrospect, with later generations, looking back, necessarily having at their disposal hindsight knowledge. Against world history, the history of international law focuses on changes of international legal norms, which contemporary actors credited with the capacity of limiting the choices of patterns of the cross-border action of political communities.
2. The existence of international law, the law among states and the law of war and peace does not depend upon the retrospective recognition of a "lasting international legal order"[127] in the view of later generations. Determining what an international legal norm or a complex of such norms is, takes place according to categories pertaining to each period and must not be deducted from a retrospectively imposed legal theory. The acceptance as "lasting" of an international legal norm does not follow from ex post beliefs but hinges upon expectations by contemporary actors. As far as they can be specified, these expectations, in many parts of the world to the end of the eighteenth century, sprang from the postulate that at least some international legal norms owe their origin not to human action and are, by consequence, not subject to human will. The history of international law has to record and, where possible, to explain the well attested fact that these expectations often conflicted with effective cross-border norm-setting activity of political communities, rather than censuring these expectations for their alleged lack of professionalism of theorising about and implementing international legal norms.
3. The historiography of international law must be based on the critical scrutiny of primary sources, that is, extant close contemporary statements about continuities and changes in the past. The major criterion for the selection of primary sources is conditioned by the link of the concepts of international law, the law among states and the law of war and peace to legal norms, which must be verifiable with regard to the degree of their enforceability. According to this criterion, the focus is on sources recorded in writing as well as through pictures, which may be supplemented by material records. Oral traditions, which have not been preserved as such, must be transmitted in writing, in order to qualify as historical source in the given context. The implication of this limitation is that the question cannot be raised whether or not there was some law of war and peace before its earliest recording in written texts. In order to reconstruct purportedly preliterate "international legal orders" and forms of rulership, Nussbaum, Preiser and others have resorted to the use by proxy of travel logs and ethnographical descriptions of purportedly "primitive"

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[123] Fisch, *Krieg* (note 56). Fisch, *Die europäische Expansion und das Völkerrecht* (Beiträge zur Kolonial- und Überseegeschichte, 26) (Stuttgart, 1984).

[124] Jean-Matthieu Mattéi, *Histoire du droit de la guerre. 1700 – 1819*, 2 vols (Collection d'histoire du droit. Série Thèses et travaux, 10) (Aix-en-Provence, 2006).

[125] David Jayne Hill, *A History of Diplomacy in the International Development of Europe*, 2 vols (New York, 1905) [reprint (New York, 1967)]. Matthew Smith Anderson, *The Rise of Modern Diplomacy. 1450 – 1919* (London and New York, 1993), pp. 20-40. Jeremy Martin Black, *A History of Diplomacy* (London, 2010).

[126] Guillaume Bacot, *La doctrine de la guerre juste* (Paris, 1989).

[127] Wolfgang Preiser, 'Die Epochen der antiken Völkerrechtsgeschichte', in: *Juristenzeitung* 23/24 (1956), pp. 737-744, at p. 737 [reprinted in: Presier, *Macht und Norm in der Völkerrechtsgeschichte*, edited by Klaus Lüderssen and Karl-Heinz Ziegler (Baden-Baden, 1978), pp. 105-126]. Ziegler, *Völkerrechtsgeschichte* (note 50), p. 3.

cultures, which nineteenth- and early twentieth- century American and European anthropologists and legal historians mainly spotted in Africa, America and the South Pacific.[128] Yet this approach is methodologically flawed, as it is not based on sources and, by consequence, void of any merit for critical historiography. Moreover, the historiography of international law does not present the success story of the seemingly increasing regulation of the conduct of relations among states in the sense of the postulate of the "regulatory turn".[129] The postulate, informing much historical writing about international law of the nineteenth and most of the twentieth centuries, that history should be recognised as "epídosis eis hautó",[130] that is, as a progressive addition to itself, is drawn on the philosophy of history, which Georg Wilhelm Friedrich Hegel (1770 – 1831) formulated early in the nineteenth century, and can therefore not be regarded as applicable for all periods and cultures. By contrast, the historiography of international law takes into account legal norms, which contemporary actors accepted as pertaining to the law of war and peace, the law among states and international law respectively. In so far as contemporaries perceived these norms as unset, it is justifiable to expect that they regarded these norms as connected with, if not derived from religion. Therefore, the close ties between specifically the law of war and peace as well as the law among states with religious beliefs is not indicative of some lack of the rationality of theoretical approach to and practical handling of international legal norms, but manifestation of a specific time- and culture-bound rationality, which is not in need of conforming to retrospective standards.

[128] Nussbaum, *History* (note 87), p. 1. Wolfgang Preiser, *Frühe völkerrechtliche Ordnungen der außereuropäischen Welt* (Sitzungsberichte der Wissenschaftlichen Gesellschaft der Johann-Wolfgang-Goethe-Universität Frankfurt/Main, 1976, Nr 4/5) (Wiesbaden, 1976). Stefan Breuer, *Der charismatsche Staat* (Darmstadt, 2014), pp. 39-67. Friedrich Ratzel, *Völkerkunde*, second edn (Leipzig and Vienna, 1894) [first published (Leipzig and Vienna, 1885)]. Bronislaw Kaspar Malinowski, 'An Anthropological Analysis of War', in: *American Journal of Sociology* 46 (1941), pp. 521-550 [reprinted in: Leon Bramson and George W. Goethals, eds, *War. Studies from Psychology, Sociology, Anthropology* (New York, 1968), pp. 245-268; first publication of this edn (New York, 1964)]. Johann Baptist [Giovanni Battista] Fallati, 'Keime des Völkerrechts bei wilden und halbwilden Stämmen', in: *Zeitschrift für die gesammte Staatswissenschaft* 6 (1850), pp. 151-242.

[129] Jacob Katz Cogan, 'The Regulatory Turn in International Law', in: *Harvard International Law Journal* 52 (2011), pp. 321-372.

[130] Johann Gustav Droysen, *Historik* [latest version by the author, 1882], edited by Peter Ley (Stuttgart, 1977), p. 421.