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History of International Law, Basic Questions and Principles

Wolfgang Preiser

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A. The Subject of the History of International Law

1 The academic study of the history of → ***international law***, as a separate subject of research, began at the end of the 18th century. Remarkably, in 1795 the first work of its kind—Robert Ward's *An Enquiry Into the Foundation and History of the Law of Nations in Europe, From the Time of the Greeks and Romans to the Age of Grotius* (P Wogan, P Byrne, W Jones, and J Rice Dublin 1795, reprinted by The Lawbook Exchange Clark 2005)—attempted to give a comprehensive treatment of the subject from antiquity onwards. The attempt, arising out of the encyclopedic spirit of the age, found many adherents. During the course of the 19th century, there followed a series of comprehensive works with varying contents about similar structures. However, a history of the **law** of nations as such, ie a history of **law** as it had developed and had been applied in practice to govern the peaceful and hostile relations between States and State-like entities (→ *State*), is as little in evidence in these works as it is in their 1795 progenitor. They are largely uncritical, derived from secondary rather than original sources, and restrict themselves almost entirely to a history of the relations between States. Where legal questions appear at all, they do so entirely in the background, behind the exposition of foreign policies and their effects. Thus, the State → *treaties* from antiquity to the early modern period, which were compiled in an extraordinarily comprehensive way in the first half of the 18th century, and which would have lent themselves to a reconstruction of large parts of **international law** as it was practised, remained virtually ignored throughout the historiography of **international law** during the whole of the 19th century. From a legal point of view, what these comprehensive works offer is largely **international** legal theory, ie the repetition and explanation of the schools of thought in **international law** which followed, one upon the other, during the first three centuries of the modern era (→ ***International*** *Legal Theory and Doctrine*). A general history of **international** relations in combination with a history of the science of **international law** restricted to the modern era, each executed without links to the other, was no conceptual basis for fruitful developments in this new area of legal history (→ ***International*** *Relations, Principal Theories*; → *Methodology* ***of International Law***). Under these circumstances, it is by no means surprising that the historiography of **international law** made no real progress for more than a century.

2 A change for the better resulted, characteristically, from a change in the intellectual approach to the subject. The comprehensive works, which prior to the 1880s had stood unchallenged in the forefront, were increasingly joined thereafter by monographs dealing with the individual institutions or events in the legal relations between States as well as by investigatory works concentrating on the **international** legal content of specific periods limited by time and place and therefore more easily comprehended and analysed. With these individual studies, whose authors not infrequently combined the qualities of both lawyers and historians, the history of **international law** began to meet the academic standards necessary for it to be recognized as a branch of legal history.

3 Given the above development, it is no coincidence that the century-old tradition of the comprehensive treatment was not continued beyond the 19th century. Scholars of **international law** had become conscious of the barrenness of the path that had been hitherto followed; on the other hand, none had yet taken notice of the fact that for some time scholars in neighbouring disciplines had been working to provide them with the means to a promising new start. With this background the manner and means whereby the subject under research was tackled historically in the first third of the 20th century shows all the signs of a solution of last resort. No investigation was undertaken into the history of non-European or older European **international law** (→ *History* ***of International Law****, Ancient Times to 1648*; → ***International Law****, Regional Developments: Africa*; → ***International Law****, Regional*

Developments: East Asia; → ***International Law** , Regional Developments: Islam*; → ***International Law** , Regional Developments: Latin America*; → ***International Law** , Regional Developments: South and South-East Asia*); instead, studies were restricted to the theory and practice **of** European **international law** in the modern era. As all the introductory historical sections **of** the leading textbooks agree, it was not until this time that there appeared, in the shape **of** nation States possessing unlimited → *sovereignty*, those → *subjects **of international law*** which, together with the simultaneously and universally blossoming theoretical study **of** constitutional and **international law** , provided the doctrinal bases for a legally ordered system **of** States (→ *States, Sovereign Equality*). At this time the only open question was the date when the **international law of** the modern era was supposed to have begun. After some hesitation, a willingness was expressed to go back a good century before Hugo Grotius, to King Charles VIII **of** France's Italian campaign **of** 1494, Niccolò Machiavelli and Jean Bodin, to the overseas expansion **of** the European maritime powers and to the theories **of** the Spanish late scholastics. Everything lying further back, even in cases where important development factors were recognized, was consciously left out **of** consideration. This self-limitation as to time and place, which is difficult to understand in retrospect, cannot be solely explained by dissatisfaction with the modest results **of** previous efforts and a fundamental resignation growing out **of** it. It is only wholly understandable when the modern age's characteristic overvaluation **of** all intellectuality and expounded theory is borne in mind. In the field **of law** this overvaluation led to the extraordinary assumption that a higher legal order could be neither developed nor sustained in the absence **of** legal scholarship. The great weight that was still placed at the turn **of** the century on this assumption—which in the meantime has long been recognized as misguided—was again made manifest in the reluctance **of** reputable authors, discarded only at long length, to recognize the existence **of** a pre-Grotian **international law** .

4 A further contributory factor to this extraordinarily narrow outlook over the field **of** history may have been the circumstance that European **international law** in the meantime had spread throughout the world without serious resistance. Here one is almost inclined to suppose that the satisfying knowledge in the late 18th century **of** having created, along with one's own system, the major element **of** the new world **international** legal order, had the temporary effect **of** causing contemporary scholars to ignore not only elements **of international law** which had existed up until the late 18th century in the world outside Europe, but also earlier European **international law** .

5 Our picture **of** the history **of international law** has undergone many changes through the solid and ever more detailed research **of** the last hundred years **of** which the most recent decades have been **of** the greatest significance. From the many corrections and additions to this picture, some **of** them fundamental in nature, only the most important can be singled out here.

6 It was evident from a comparatively early point that the basic requirements for an **international** legal order were fully present in the European society **of** States not just at the beginning **of** the modern era, but, at the latest, by the end **of** the 13th century. It was recognized that the concepts **of law** and legal validity underlying European **international law** , the justifications which were always necessary when an action entailed intervention in a foreign area, the duty to participate in common → *sanctions* against disturbers **of** the peace, and other basic ideas all went back to the early era **of** the ancient Greek *polis*, ie to the sixth century BCE (→ *Intervention, Prohibition **of***). It was further recognized that not merely in the modern era, but at all times **international** legal practice was accompanied by the theoretical ideas and claims **of** theologians, philosophers, historians and, later, lawyers. What this means is that, although the theory **of** the modern era became vastly more detailed over what had hitherto been customary, it hardly contained anything in principle that was new. Since the beginning **of** the 1930s, following in the footsteps **of** historical and archaeological research, the history **of international law** finally began to explore the wider world

beyond Europe. First **of** all the history **of** **international** **law** turned to the ancient Near East—which also includes Egypt—and to later **international** legal developments in the region; in particular, those brought into being from the sixth decade **of** the seventh century onwards by the formation and spread **of** Islam (→ *Islamic Approach to* ***International*** ***Law***). The most incisive changes to the picture handed down by the 19th century may, however, be expected from the efforts which only began in recent decades to uncover **international** legal developments which, **of** their own volition, appeared in the world outside Europe and away from the Mediterranean. As yet, no more than a start has been made. It is nevertheless possible, even given the gaps in our knowledge, to accept as proven that there is, beyond the world **of** the Near East and Europe—which understandably claimed the attention **of** early researchers—evidence **of** **international** **law** scattered over the earth in abundance. There are at least two cases, in the ancient Chinese system **of** States in the first half **of** the last pre-Christian millennium, and in the Central American society **of** States existing in the last pre-colonial phase, where **international** **law** existed and flourished over a long period **of** time.

7 What then emerges from the above as far as the subject **of** contemporary history **of** **international** **law** is concerned? Two possibilities exist. On the one hand, it remains legitimate to continue the restrictive approach **of** investigating the earlier legal periods out **of** which first developed the European **international** **law** **of** the modern era and, eventually, the present world **international** **law** : 'Our' **international** **law** , as it is called in a well-known book review—Josef L Kunz on Georg Stadtmüller's *Geschichte des Völkerrechts* (History **of** Public **International** **Law** ; translation by the editor). However, as far as the leading ideas and institutions **of** **international** **law** are concerned, one needs to reach out as far as the given state **of** research allows and requires. Put in a concrete way, one can ignore neither the **international** legal evidences **of** classical antiquity, nor those **of** the ancient Near East, which influenced patristics through the Old Testament, via the late Persian Empire and late Roman **international** legal practice. One must further take account **of** the **international** **law** **of** Islam, which for more than 13 centuries has been indissolubly linked with the Occident and the areas in the east remaining Christian, the two systems reciprocally influencing each other for better and for worse.

8 On the other hand, there is much to be said for refusing to be satisfied with the extensions to the history **of** European **international** **law** outlined above and instead for opting definitively for the inclusion **of** the **international** **law** systems which arose away from the world **of** Europe and the Near East—which until recently have been treated rather like isolated, inconsequential curiosities—within the subject **of** history **of** **international** **law** . The objection here that, strictly speaking, these are not direct antecedent stages **of** 'our' history is not tenable. General legal history is, for good reasons, concerned with all legal developments **of** the past regardless both **of** where or when they appeared, and also **of** whether or not they prevailed over the longer term. The history **of** **international** **law** has no reason for proceeding otherwise. There is no danger that the claims **of** a universal history **of** **international** **law** will lead to a downgrading **of** the European history **of** **international** **law** . The latter's position is secure for all time by reason **of** the fact that European **international** **law** developed into world **international** **law** , and because **of** the lavish quantity, variety, and easy accessibility **of** the available materials. Looked at from the other side, the history **of** **international** **law** stands to gain in many ways from the inclusion **of** research subjects which, until now, have remained neglected. For those who aim to find their intellectual standpoint in this world and who accordingly are used to viewing the world as historians, every new segment **of** past reality whose **origins** or process are laid bare by research represents an expansion **of** specialized knowledge and general insight, and thus, a gain. The historian **of** **international** **law** , for his part, will see his task in gaining command over the **international** legal developments **of** the period in question and placing them in their correct context. The knowledge thereby acquired is in itself valuable. Greater still is the fortune when a newly discovered part **of** the past is found to supplement in a surprising way another already

very well known part, together producing a new picture to add to our appreciation of the legal position of the time. Thus, for the first time a good decade ago the rather substantial contribution of the Chinese legal tradition to the great Russo-Sino system of treaties concluded at the turn of the 17th to the 18th centuries—Treaties of Nerchinsk (1689) and Kiakhta (1727)—was systematically researched and identified while, at the same time, from the remaining Russian portion, the attempt was made to differentiate between the common treaty traditions in Europe and a specifically Russian variant (Scheu). No less revealing for European observers was the result of an investigation carried out some years earlier on the relations between Great Britain and the world of Indian States during the first 300 years of the modern era (Alexandrowicz). Recognition of the equality and unlimited sovereignty of those States arose not out of the free will of an obliging European Great Power so much as the persistence of the Asian partners in observing the old Hindu tradition, under which equality and full sovereignty were understood to be the self-evident prerequisites of international relations. That, in addition, this tradition survived the expansion of Islamic domination over large parts of Asia—which was contemporaneous with the arrival of the first European in the area—shows only how deeply rooted it was. The universal history of international law which, it is hoped, will be written in the future, will thus not only help developments outside Europe to attain their rightful places; in some cases the results will also redound to the advantage of the history of European international law. The last and not least gain that may be expected from an unrestrictive inclusion of all that ever came into being as international law on the earth is the new possibility of a comparative legal history on a grand scale. The comparative law approach as such is nothing new for the history of international law (→ *Comparative Law, Functions and Methods*). Individual institutions, for example international → *arbitration*, or fundamental notions, which have appeared under different names, such as that of the just war, have been treated quite successfully using a comparative legal approach with regard to the form which they have taken as this has varied according to time and place. However, until now the comparison has been restricted almost entirely to different epochs in the history of European international law. Once research into the unexplored areas of international law has advanced sufficiently far to banish the danger of premature generalizations, this approach will be able to draw on an abundance of new and in part no doubt fascinating and exotic material. We may hope to see the appearance of new questions and answers; certainly much will be learned, not least about those periods we have long thought to know well. The ultimate aim of all conceivable comparative work in the area of the history of international law is not the comparison of individual phenomena, whatever their intrinsic importance, but the comparison of entire epochs. This means comparing above all those periods of time for which the claim can be made, after careful evaluation of the evidence for and against, for the existence of a legally ordered inter-State system which on its own merits persisted over a longer period of time alongside the mere use of force (→ *Use of Force, Prohibition of*). Put differently, what is here at issue is a comparative examination of independently developed, functional international legal orders which helped influence the legal character of their respective eras.

B. The Importance of the History of Ideas for the History of International Law

9 The modern era's characteristic and extraordinarily high regard for theory is patently demonstrated in the area of the history of international law by the fact that an exhaustive work on the literature of international law (von Ompteda) had already appeared in 1785, a full 10 years earlier than the first attempt to present the phenomenon of international law itself. Moreover, a consequence of this 1785 work has even been that a separate discipline within the international legal scholarship has developed which remains unparalleled in any other branch of legal scholarship. Under a variety of names, the history of the literature of international law continued as a separate subject up to the third decade of the

20th century—albeit in the end merely as a compilation **of** current literature available worldwide, and no longer as a history **of** the ideas or schools **of** thought underlying **international law** which had previously been the approach preferred and which is **of** sole concern here.

10 **International law** has always been obliged to defend both its existence and the legal character **of** its principles against doubters and outright negators. In this respect, **of** all the legal disciplines it may best be compared with criminal **law** . However, as opposed to criminal **law** , it neither has a written order, nor does it have the possibilities **of** compelling by means **of** its own sanctions the observance **of** its principles based on custom and treaty by those contesting its very existence (→ *Customary* ***International Law***). In this highly unsatisfactory situation, which has been known to the historians **of** **international law** in all periods and which may only be radically changed in some distant, hoped for future, **international law** requires immutable, generally recognized guiding principles all the more; should these be culpably disregarded, the only response must be condemnation by the great majority **of** the society **of** nations, accompanied if necessary by the threat **of** collective sanctions. Thus, the desire to break out **of** the legal order will in the last resort be restrained by the fear **of** isolation. The scholarship **of** **international law** in the modern era has sought to weave these basic principles into its theoretical net. However, these principles were in no way discovered in this era. It is true that one cannot find these in textbooks and it is only seldom that one finds legally refined material to work on, in the form **of** treaties **of** alliance or trade, a declaration **of** war or the conclusion **of** peace, from which one could derive directly the respective principles underlying them (→ *Alliances*; → *Armed Conflict,* ***International*** ; → *Peace Treaties*). In not a few cases, we must gain our knowledge from non-legal materials. Perhaps our most important source is the actions **of** those persons who have played leading roles in shaping politics. To illustrate this point, a few particularly illustrative examples may be cited:

11 *a)* In the second half **of** the 14th century BC, the realm **of** the Hittites, whose centre lay in eastern Asia Minor, was visited by a tenacious plague which depopulated the country. An oracle traced the epidemic back to malfeasances committed by the father and predecessor **of** the reigning king, which included the breach **of** an inter-State treaty which was placed under the protection **of** the gods by means **of** mutual oath. The deity, offended by this breach **of** oath, now revenged itself on the transgressor's descendants. Our knowledge **of** this case is due to the so-called plague prayers **of** King Mursili—to documents **of** religious life and not **of** politics or **law** . From these documents we learn with a certainty excluding all doubts that soon after the middle **of** the second pre-Christian millennium, the ruler **of** an Asia Minor State was no less conscious **of** his unalterable duty to observe a sworn agreement—ie to keep to a treaty concluded with the ruler **of** a foreign State who, for some time, had been his main external antagonist—than a legally-minded statesman **of** our own time.

12 *b)* For a long time in the ancient Greek world **of** city-States, theory and practice were in absolute contradiction over the question as to who might belong to the society **of** States as a legal subject. According to theory, whose proponents in the fifth century were the tragedians and in the fourth century the State philosophers, non-Greeks—ie barbarians—were precluded from the very start from participation; they and the Greeks were 'by nature in a state **of** war with each other' (Plato *The Republic [Politeia]*—written around 374 BC). However, thanks to evidence which has been handed down to us in the form **of** inscription, we know that as early as 377 BCE there was a call to participate in the Attic maritime league, which had been founded anew in an amended form. The call is addressed to all inhabitants **of** the mainland and the inhabitants **of** islands not living under Persian domination 'whether Hellene or barbarian' (Herodotus *Artemisia at Salamis*—written around 480 BC). In the fifth century, the Greeks would admittedly not have gone so far. However, in the fourth century, State practice, in a fundamental matter, openly and irrevocably ceased following theory and demonstrated that it had long evolved its own theory according to which it was

prepared to act.

13 *c)* Only from the actual conduct **of** the participants is it finally possible to infer the concept **of** sovereignty unique in its kind, which developed in the European Middle Ages. As long as the view was uncritically adhered to that the Middle Ages retained the Roman idea **of** unlimited sovereignty in its full extent (Proculus 'Libro Octavo Epistularum' in T Mommsen [ed] *Corpus Iuris Civilis* [Weidmann 1908] XLIX.15.7.1: 'liber…populus est is qui nullius alterius populi potestati est subiectus' [that people is free that is subject to the power **of** no other people; translation by the editor]), significant elements **of** legal life during the Middle Ages had to be excluded from the area **of international law**. Over the years the recognition has been won that also in this area the Middle Ages avoided any kind **of** exclusivity. The State, commanding unlimited sovereignty—*civitas superiorem non recognoscens* (the State does not recognize a superior; translation by the editor)—was certainly not unknown in the Middle Ages: The concept is a leading theme which occurs as early as the late Middle Ages and is not simply a product **of** the modern era. Alongside this, however, there existed what recent legal historical research calls divided, graduated or hierarchically ordered sovereignty. In those times, second and third rate powers, rulers over medium and small sized dominions, both secular and ecclesiastical, associations **of** cities, individual cities, and parishes, all had relations with each other without encountering any serious obstacles, dealing with one another and with the unlimited sovereigns in almost every sphere in the manner **of** unlimited, fully empowered bearers **of** dominium. From this situation arose the flourishing system **of** arbitration which, in its importance for the maintenance **of** internal and external peace, has rightly been ranked alongside the arbitrations **of** ancient Greece.

14 The particular importance which attaches to modern doctrine cannot be denied. It completes much which first started in earlier epochs, and from scattered principles and rules it has built an intellectual system. Nevertheless, what it has achieved and continues to achieve has already been acknowledged repeatedly from a great variety **of** points **of** view. The evaluation, even the basic exploration **of** pure theory, which, although it never reached the status **of** an intellectual discipline, accompanied **international** legal practice **of** every other era, is still in its early stages. It accordingly deserves to receive preferential treatment.

C. The Problem of the Chronological and Regional Subdivision of the History of International Law

15 The range **of** problems concerning chronological and regional subdivision cannot be thoroughly examined here. We accept that writers **of** the history **of international law** must also be allowed to apply the intellectual principle **of** order called categorization by period which is utilized by all historians, irrespective **of** specialization, when they perceive their task to be the comprehension retrospectively **of** an uninterrupted flow **of** events. It is regrettable that a living process should be thus divided into chronological and locational sections; yet, taking our limited powers **of** absorption into consideration, it cannot be avoided. Similar problems are also inherent in the investigation **of** a single phenomenon: there is a certain element **of** arbitrariness whenever a subject **of** research is separated from its surroundings. We can only seek to keep this element as small as possible, to hold to the natural run **of** events, and otherwise to trust in the implicit powers **of** synthesis with which man, to a greater or lesser extent, is endowed.

16 The history **of international law** follows political history when dividing into periods. Often, depending on the questions under examination, it ends by departing from this path. Thus, for example, both general historians in the history **of** the Roman Republic and historians **of international law** agree that 168 BCE was an epoch-making year. This was the year when → *Macedonia* as a State was destroyed and when the Seleucid ruler, Antichos IV, standing victorious before Alexandria, was chased back to his realm by no more than the command **of** a Roman legate. Thereafter, the last two powers that Rome had recognized as

independent and equal could no longer be contemplated as such. The general historian, having given full credit to this epochal turning point, may without pausing turn to deal with the period that followed. As far as the historian **of international law** is concerned, an epoch has also come to an end. However, the first requirement for **international law** as the **law of** inter-State coordination is now missing; the simultaneous existence **of** several States which, free **of** one another's power **of** command, mutually respect each other as independent entities **of** equal rank. Instead, in place **of** an equality long grown precarious, there arose a subordination **of** all under a dominating empire. The fact that the traditional forms **of international law** were still maintained for a while longer, in a limited fashion, rested on the victor's free will and ability to afford the appearance **of** generosity; in reality they signify nothing. Centuries passed before the Roman Empire was confronted with a partner, in the shape **of** the late Persian Empire **of** the Sassanians, first claiming and then de facto achieving equality **of** status, resulting in the development **of** a new **international** legal order in the east **of** the then known world.

17 Finally, a last word on the question **of** whether in cases **of** doubt a chronological or regional subdivision should prevail. This question cannot have a simple answer. If what is at issue lies within a particular legal order, say European **international law** or one **of** its antecedent stages, the first resort will be to subdivide chronologically. Should the investigation become wider, necessitating, for example, the comparison **of** contemporaneous phenomena having the same roots, then the chronological subdivision will be more appropriate when it is desired to discover whether an entire parallel **international** legal system has developed separately. However, the formation **of** this **international law** will in turn itself be investigated by using a chronological subdivision.

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