Introduction

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During the past thirty years, the history of public international law has become an important field of research in various disciplines. New discussions of the origin, growth and evolution of international law from the fifteenth century to the present are at the origin of different proposals for reinterpreting the history of international law and legal discourse, mainly from the perspective of those who were largely excluded from participating in this discourse, such as colonized nations, indigenous peoples and religious or cultural minorities. By questioning the classical narrative of international law as a story of progress, the new de-centred interpretations aim at showing how international law was used by the centre as a means to dominate and exploit the periphery, and how different kinds of moral universalism have accompanied imperial expansion. Much of the recent literature testifies to an overall attempt to reinterpret the history of international law and legal discourse in terms of an ideology legitimizing European colonialism and imperialism.

While revisionist history covers a much longer time-span, references to moral and legal discourse in the seventeenth and eighteenth century form a crucial element of it mainly for two reasons. First, critical accounts of international law require questioning of the narrative inherited from the nineteenth century, which attributed a central role to the Peace of Westphalia or, rather, to what is considered today as the ‘myth’ of Westphalia. According to this myth, international law proper – that is, law exclusively applicable to states as such and regulating the relationships between them – was first developed in Europe, in the context of a system of sovereign and independent states, which consider each other to be free and equal. According to the formerly dominant story of international law, this system of states was founded in the treaties of Westphalia, and it was concluded, as Jennifer Pitts put it, that ‘this essentially European system gradually came to incorporate other states as they reached the appropriate “standard of civilization”, or, as more recent language would have it, as they entered the state system or decolonized and became independent’.¹ A historically more accurate account of the peace settlements of 1648 shows,

1 Jennifer Pitts, ‘Empire and Legal Universalisms in the Eighteenth Century’, *American Historical Review*, 117 (2012): 92–121, at 93. I forgo here any attempt to account for the relevant literature. A broad overview is presented in Bodo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012).

however, that the so-called 'Westphalian system' was, rather, an ideal-type interpretation of the European legal order as it was proposed by Emer de Vattel around the middle of the eighteenth century – an interpretation which did not accurately reflect the positive European law of nations. The development of international law thus needs to be studied against the background of the complex and shifting legal order within and among the European states, including conflicts connected to imperial expansion.

The second reason why the period from 1625 to 1800 plays an important role in deconstructing the 'progress' story of international law has to do with the very concept of international law. The term 'international law' was coined by Jeremy Bentham, to designate the body of legal rules and norms which apply between sovereign states and other entities that are legally recognized as international actors.² The term was eventually to replace the older phrase 'law of nations' (*jus gentium*, *droit des gens*, *Völkerrecht*),³ which was still used in the context of modern natural law. For a long time, there was no clear distinction between the *jus intra gentes* and the *jus inter gentes*, and the law of nations could not be conceived independently from the law of nature. Hugo Grotius has famously been credited with the foundation of a 'dualist' account of the law of nations – consisting of the 'natural' law on one hand and the 'voluntary' law of nations on the other – and thus with the pulling apart of the formerly tight relationship between the law of nations and natural law. This move is held to mark the birth of international law in its modern sense. This was, however, a complicated story, which needs to be explored on the basis of a wide range of sources and taking into consideration the competing definitions of the law of nations. Grotius' 'dualist' account of the law of nations, which was later taken up by Christian Wolff and Emer de Vattel, was, for instance, challenged by Samuel Pufendorf and his numerous followers, who maintained that there was no such thing as a 'voluntary' law of nations.⁴ These rival accounts of the law of nations were especially important

2 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. by H.J. Burns and H.L.A. Hart (London: Athlone Press, 1970), 296: 'The word international, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes under the name of the law of nations: an appellation so uncharacteristic that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence'.

3 There is no unified spelling of the word 'ius' in seventeenth- and eighteenth-century editions. Depending on the publisher, the spelling is either 'ius' or 'jus'. In the present volume, 'ius' will appear only where the reference is to a specific edition.

4 Stephen C. Neff, *Justice among Nations: A History of International Law* (Cambridge, MA: Harvard University Press, 2014), chap. 11.

in relation to the law of war, where the 'dualist' account allowed that questions of intrinsic justice, which referred to 'natural' law, could be relegated to the conscience of sovereigns, whereas the 'voluntary' law, which regulated the formal conduct of war, was a flexible tool for adapting the strict rules of justice to practical necessities. This had important consequences with regard to issues such as the declaration of war, rights in war, peace-making, and neutrality.⁵

One of the questions addressed in this volume is whether and to what extent the law of nations, as it was conceived within the tradition of modern natural law, beginning with Grotius' *De jure belli ac pacis* (1625), fits into the counter-narrative of the history of international law described above. This question merits attention since specialists in the field have argued that the justification of colonization and imperial expansion was by no means the central aim of the modern law of nature and nations.⁶ Unlike Grotius, the main representatives of this tradition in the seventeenth and eighteenth centuries paid comparatively little attention to the antagonism between 'civilized' Europeans and 'barbarian' others. They were more concerned with the 'barbarians' within Europe and sought to develop a code of conduct suitable to regulate the European nations. The main question after the Peace of Westphalia was how to ensure peaceful coexistence among the European states by means of diplomacy, alliances, arbitration, guarantees and (threat of) intervention, the last being often linked to the idea of the balance of power. Such legal and political devices were theorized within the framework of the law of nature and nations, albeit never from a single, unified perspective. Quite to the contrary, doctrines of the law of nations were forged and developed in various contexts, where questions of power and state interest intermingled with attempts to conform with natural-law rules of justice.⁷

5 Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2015), part II.

6 Emmanuelle Jouannet, 'Des origines coloniales du droit international: à propos du droit des gens moderne au 18^e siècle', in *The Roots of International Law – Les fondements du droit international*, ed. by Pierre-Marie Dupuy and Vincent Chetail (Leiden, Boston: Martinus Nijhoff, 2014), 649–671. For a nuanced account of the law of nations see also Georg Cavallar, 'Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism or True Cosmopolitans?', *Journal of the History of International Law* 10/2 (2008): 181–209.

7 In his study of the historical evolution of occupation, Andrew Fitzmaurice shows, for example, in an exemplary way, how the intellectual contexts and the contexts of imperial practice shaped different theories of occupation and the uses that were made of these theories: Andrew Fitzmaurice, *Sovereignty, Property, and Empire, 1500–2000* (Cambridge: Cambridge University Press, 2014).

So far, accounts of the history of the modern law of nations have mainly focused on a restricted number of classic treatises, such as the published works of Hugo Grotius, Samuel Pufendorf, Christian Thomasius, Cornelius van Bynkershoek, Christian Wolff or Emer de Vattel. While lesser known figures have occasionally been dealt with in the specialized literature, we still know comparatively little about this very rich tradition of moral and legal thinking and its influence on the law of nations and legal practice in various European countries. In this context, the fact that the law of nature and nations constituted, from the late seventeenth until the middle of the nineteenth century, an academic discipline that was taught at a great number of universities and other institutions of higher education throughout Europe no doubt plays a crucial role.

This volume explores, for the first time, a wide range of formerly obscure literature related to the law of nature and nations. The volume presents studies conducted by participants in the international research network 'Natural Law 1625–1850', many of whom are currently working on archival materials related to the teaching of the law of nature and nations in various European countries. These case studies show how the conception of the law of nations varied in intellectual content and practical function, depending on the contexts in which it was developed and applied. They are supplemented by new interpretations of classic texts in the field and by studies of figures and theories hitherto largely neglected in research.

The volume comprises three sections. In the first, 'Teaching the Law of Nations', the studies show by way of examples what can be gained from exploring the law of nature and nations on the basis of specialized academic texts on the subject (dissertations, textbooks, programmatic writings, etc.) and general introductory courses. This literature emerged in several European countries and in a variety of educational institutions, often addressed to specific audiences. One example is that of the *Ritterakademie*, a particular kind of institution in the Holy Roman Empire aimed at preparing the sons of the nobility for their future functions as civil servants. Several programmatic writings connected with the short-lived *Ritterakademie* at Erlangen (1701–1741), in the Franconian magravate of Brandenburg-Bayreuth, show the significance of the law of nature and nations not only in the education of this social class but also how it was used to keep ministers and magistrates at German courts informed about developments in international law, such as diplomatic immunity.

Two further chapters deal with the law of nature and nations in the Danish context, which is rarely considered in historical accounts of international law in the eighteenth century. One study focuses on the inaugural dissertation of Andreas Hojer, who was appointed as first *ex officio* professor of the law of

nature and nations at Copenhagen University in 1734. By discussing the dissertation against the political and polemical background of Denmark-Norway's participation in the Great Northern War, the author shows how expertise in the law of nature and nations was used to defend the political interests of the Danish monarchy. At the same time, he explains why there had been ongoing concerns with improving the teaching of the law of nature and nations at Copenhagen University for decades before Hojer was appointed: Denmark-Norway needed an academic expertise in the field comparable to that of the university in Kiel, which had been among the first universities to create a chair in natural law and appointed teachers able to defend the interests of the rivals of the Danish kings in the Great Northern War. Yet another chapter explores how Danish interest in the law of nations was reinvigorated by the outbreak of the French Revolutionary Wars and the events leading to the foundation of the Second League of Armed Neutrality in 1800. The chapter shows how teaching at Copenhagen University was adapted in a textbook used to teach the law of nations at the Royal Danish Naval Academy at the very beginning of the nineteenth century. The work included thoroughgoing reflections on the different applications of the universally valid law of nations to morally and culturally 'developed' European nations on the one hand and 'barbarian' and 'savage' nations on the other. Not surprisingly, the textbook also deals extensively with trade and shipping, the laws of war, and the rights and duties of neutral nations – subject matters Danish-Norwegian naval officers had to be familiar with at the time.

The second section of this volume, 'The Law of Nations from the Peace of Westphalia to the Enlightenment', presents chapters on continuing disputes about the alleged Hobbesianism of a highly influential classic in the field, namely Pufendorf's *The Law of Nature and Nations*, and on lesser known successors of Pufendorf and Thomasius such as Johann Jacob Schmauss and Johann Gottlieb Heineccius. The focus is on how these authors judged the problems inherent in the antagonistic European state system, how they reformulated the notion of state interest and to what extent they believed that the latter could be protected by the balance of power. Yet other studies in this section take up some of the key questions raised above in connection with the challenges that the revisionist history of international law faces with regard to the tradition of modern natural law. On the one hand, there is the question of how the distinction between 'civilized' and 'savages' or 'barbarian' nations featured in Vattel's treatise on the law of nations. It is suggested that the Swiss author did not use this distinction to demarcate Europeans from non-European 'others'. He distinguished rather 'men' from 'monsters' on the basis of a specific history of progress, a vision of the advancement of humanity driven by enlightened monarchs, who had a

correct understanding of enlightened self-interest and true glory, as exemplified by Tsar Peter the Great. On the other hand, this section offers a novel unmasking of the ‘myth’ of Westphalia by showing how natural lawyers writing on the law of nations dealt with the guarantees and interventions in the domestic affairs of the Holy Roman Empire that had been laid down by the Peace of Westphalia. It turns out that while some natural lawyers did welcome interventions to protect foreign subjects in accordance with the guarantee of the peace treaties, others proved to be highly critical of interventions because of concerns that the guarantee would be instrumentalized by France under Louis XIV.

The chapters in the third section deal with ‘The Law of Nations and the *école romande du droit naturel*’. The idea here is to shed new light on the intellectual context in which Emer de Vattel developed his highly influential treatise on the law of nations. The main representatives of the Swiss school of natural law before Vattel, Jean Barbeyrac and Jean-Jacques Burlamaqui, inaugurated natural law as an academic discipline in the French-speaking part of the old Helvetic confederation and their works had a decisive influence all over Europe. This is generally well known, but the academic and historical background to their teaching, the publishing strategies they and their disciples adopted, and the debates their publications triggered in various European countries, especially with regard to the law of nations, have so far not been studied in their own right. Such questions are addressed in a chapter on the definition of the law of nations in the Swiss context, which takes into account the multi-volume Latin edition of Grotius’ *De jure belli ac pacis*, published in Lausanne in 1751–1752. The novel feature of this edition consists in the integration of the extensive annotations and commentaries to Grotius’ work by Heinrich and Samuel Cocceji (father and son), which had previously been published in Breslau as *Grotius illustratus*. While the reasons Barbeyrac’s disciples had for preparing this edition are not wholly clear, there is no doubt that the Coccejis’ radical critique of Grotius’ ‘voluntary’ law of nations strengthened the ‘naturalist’ position of Pufendorf and his successors, which was largely predominant in the Swiss context before Vattel resumed the Grotian ‘dualist’ account of the law of nations in his *Law of Nations*. This study is supplemented with a broad overview of the reception and use of Barbeyrac’s, Burlamaqui’s and Vattel’s works on the law of nature and nations in eighteenth-century Italy. Despite – or perhaps because of – its political fragmentation and the influence of the Roman Catholic Church, the Italian peninsula provided the context for enlightened debates on natural law, diplomacy and the law of nations, and the *école romande du droit naturel* had a major influence on these debates.

Albeit from very different angles, two further chapters in this section deal with the function Swiss natural lawyers ascribed to the enlightened self-interest

of rulers in making them comply with the natural-law rules of justice. One study takes up Jean-Jacques Rousseau's radical critique of the idea that young people, and princes, should be educated by means of books on law and ethics – which would be filled with prejudices instead of true knowledge of humanity. This is confronted with Jean-Jacques Burlamaqui's actual practice of educating a prince (Frederick II, Landgrave of Hessen-Kassel, was his pupil from 1732 to 1737) and his idea that an enlightened prince could be educated according to the law of nature and nations that he would be subject to as a ruler, in the same way as any other man. Since in Burlamaqui's view the sovereign had to become an interpreter of natural law instead of legislating arbitrarily, the prince needed to be provided with the appropriate tools for this through education. Yet another study in this part of the volume is devoted to Vattel's doctrine of the customary law of nations – a subject that has so far never been studied in the scholarly literature. The focus on custom and practice provides an interesting link between this chapter and the one on Burlamaqui. The author shows that the function Vattel attributed to custom in his account of the law of nations needs to be assessed in light of his critique of Wolff's idea of *perfectio* as foundation of natural law, which Vattel replaced with a 'noble', anti-Hobbesian, concept of self-interest. Based on this finding it is possible to show how Vattel conceived of custom as a peaceful means for states to pursue their own interest without necessarily conflicting with the law of nations. It is also shown that Vattel installed custom as a tool for mediating between the natural and the voluntary law of nations, by providing states with a flexible and dynamic source of obligation.

While the chapters in this volume take issue with questions linked to the revisionist turn in the history of international law, it does not by any means aim to compete with the specialized literature in the field, which accounts for the history of international law over a much longer period. Neither does it seek to make an overall argument about the role of international law in justifying European exceptionalism. The goal is, rather, to show how specialists in the field of modern natural law, who work on a wide range of formerly unknown sources, can contribute to a better understanding of the law of nations in the period which was decisive for its origin and constitution as a discipline which eventually emancipated itself from natural law.