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The Classical Law of Nations (15th-18th centuries)

Randall Lesaffer¹

1. *From respublica Christiana to jus publicum Europaeum*²

a) The collapse of the *respublica Christiana*

Since the 19th century, international lawyers and historians of international law generally have defended the view that modern international law roots back to the sovereign States system of

¹ The author is dean and professor of legal history at the Tilburg Law School and part-time professor of cultural and legal history at the Faculty of Law of the Catholic University of Leuven.

² For surveys of the law of nations in Early-Modern Europe: Dominique Gaurier, *Histoire du droit international. Auteurs, doctrines et développement de l'Antiquité à l'aube de la période contemporaine* (Rennes, 2005) pp. 143-479; Wilhelm G. Grewe, *The Epochs of International Law* (Berlin etc., 2000) pp. 137-424; Slim Laghmani, *Histoire du droit des gens du jus gentium impérial au jus publicum europaeum* (Paris, 2003) pp. 61-223; Arthur Nussbaum, *A Concise History of the Law of Nations* (New York, 1947); A. Pillet (ed.), *Les fondateurs du Droit International* (Paris, 1904); Wolfgang Preiser, 'History of the Law of Nations: Ancient Times to 1648', in Rudolph Bernhardt (ed.), *Encyclopaedia of Public International Law* (Amsterdam, 1995) vol. 2, pp. 722-49; Ernest Reibstein, *Völkerrecht. Eine Geschichte seiner Ideen in Lehre und Praxis* (Freiburg and Munich, 1957) vol. 1; Heinhard Steiger, 'Ius bändigt Mars. Das klassische Völkerrecht und seine Wissenschaft als frühneuzeitliche Kulturercheinung', in Ronald G. Asch, Wulf Eckart Voss and Martin Wrede (eds.), *Frieden und Krieg in der Frühen Neuzeit. Die europäische Staatenordnung und die aussereuropäische Welt* (Munich, 2001) pp. 59-85; Antonio Truyol y Serra, *Histoire du droit international public* (Paris, 2005) pp. 47-95; Stephan Verosta, 'History of the Law of Nations: 1618 to 1815', in Bernhardt, *Encyclopaedia of Public International Law*, vol. 2, pp. 749-67; Karl-Heinz Ziegler, *Völkerrechtsgeschichte. Ein Studienbuch* (2nd edn., Munster, 2007) pp. 117-168. For a bibliography of relevant sources and secondary literature: Peter Macalister-Smith and Joachim Schwietzke, 'Literature and Documentary Sources Relating to the History of International Law', *Journal of the History of International Law*, 1 (1999) pp. 136-212.

Early-Modern Europe (1500-1800). The first publication by the Dutch humanist Hugo Grotius (1583-1645) of his seminal work *De jure belli ac pacis libri tres* (1625)³ and the Peace Treaties of Westphalia (1648),⁴ ending the Thirty Years War (1618-1648), were often indicated as the very

³ Maurice Bourquin called Grotius the father of the law of nations: 'Grotius est-il le père du droit des gens?', in: *Grandes figures et grandes œuvres juridiques* (Geneva, 1948) pp. 77-99. – Over the years, his title has been challenged, e.g. by Grewe and Haggemacher, while Ziegler considered it justified: Wilhelm G. Grewe, 'Grotius – Vater des Völkerrechts', *Der Staat*, 23 (1984) pp. 161-78; Peter Haggemacher, *Grotius et la doctrine de la guerre juste* (Paris, 1983) p. 622; idem, 'Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture', in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds.), *Grotius and International Relations* (2nd edn., Oxford, 1992) pp. 133-76; Karl-Heinz Ziegler, 'Hugo Grotius als Vater des Völkerrechts', in Peter Selmer and Ingo von Münch (eds.), *Gedächtnisschrift für Wolfgang Martens* (Berlin and New York, 1987) pp. 851-8; idem, 'Die Bedeutung von Hugo Grotius für das Völkerrecht – Versuch einer Bilanz am Ende des 20. Jahrhunderts', *Zeitschrift für Historische Forschung*, 13 (1996) pp. 354-71.

⁴ E.g.: 'The peace of Westphalia 1648, may be chosen as the epoch from which to deduce the history of the modern science of international law' in: Henry Wheaton, *History of the Law of Nations in Europe and America from the Earliest Times to the Treaty of Washington* (New York, 1845) p. 69. – Recently the 'Westphalian myth' has come under attack: Stéphane Beaulac, 'The Westphalian Legal Orthodoxy – Myth or Reality?', *Journal of the History of International Law*, 2 (2000) pp. 148-77; Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty', *International History Review*, 21 (1999) pp. 569-91; Heinz Duchhardt, 'Westfälischer Friede und internationale Beziehungen in Ancien Régime', *Historische Zeitschrift*, 249 (1989) pp. 529-43; idem, 'Westphalian System. Zur Problematik einer Denkfigur', *Historische Zeitschrift*, 269 (1999) pp. 305-15; Arthur Eyffinger, 'Europe in the Balance: An Appraisal of the Westphalian System', *Netherlands International Law Review*, 45 (1998) pp. 161-87; Peter Haggemacher, 'La paix dans le pensée de Grotius', in: Lucien Bély (ed.), *L'Europe des traités de Westphalie. Esprit de diplomatie et diplomatie de l'esprit* (Paris, 2000) pp. 67-79; Randall Lesaffer, 'The Westphalian Peace Treaties and the Development of the Tradition of Great European Peace Settlements prior to 1648', *Grotiana*, new series 18 (1997) pp. 71-95; Andreas Osiander, 'Sovereignty, International Relations and the Westphalian Myth', *International Organization*, 55 (2001) pp. 251-87; Meinhard Schröder, 'Der Westfälische Friede – eine Epochengrenze in der Völkerrechtentwicklung?', in Meinhard Schröder (ed.), *350 Jahre Westfälischer Friede. Verfassungsgeschichte, Staatskirchenrecht, Völkerrechtsgeschichte* (Schriften zur europäischen Rechts- und Verfassungsgeschichte 30, Berlin, 1999) pp. 119-37; Heinhard Steiger, 'Der Westfälischen Frieden – Grundgesetz für Europa?', in Heinz Duchhardt (ed.), *Der Westfälische Friede. Diplomatie, politische Zäsur, kulturelles Umfeld, Rezeptionsgeschichte* (Munich, 1998) pp. 33-80; Karl-Heinz Ziegler, 'Die Bedeutung des Westfälischen Friedens von 1648 für das

birth-certificates of the classical law of nations that preceded and preconfigured modern international law.

First, the view that the history of international law only became relevant for the understanding of current international law with the birth of the sovereign State in Early-Modern Europe has been rightly challenged for being reductionist.⁵ Scholars have indicated the significance for the development of modern international law of earlier legal systems and traditions, more particularly those of Greek and Roman Antiquity,⁶ and of international legal developments outside Europe, more particularly in relation to Europe's confrontation with the outer-European world during the Early-Modern Age.⁷ Second, already at the end of the 19th century, some scholars argued that the roots of the sovereign State system and the classical law of nations needed to be traced back beyond the first half of the 17th century. Some authors, most prominently the American James Brown Scott and the Belgian Ernest Nys, have put the spotlight on the so-called precursors of Hugo Grotius from the 16th and early 17th centuries, such as the neo-scholastics Francisco Vitoria (c. 1480-1546) and Francisco Suarez (1548-1617) and the

europäische Völkerrecht', *Archiv des Völkerrechts*, 37 (1999) pp. 129-51; idem, 'Der Westfälischen Frieden von 1648 in der Geschichte des Völkerrechts', in Schröder, *350 Jahre Westfälischer Friede*, pp. 99-117.

⁵ Randall Lesaffer, 'International Law and its History: The Story of an Unrequited Love', in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.), *Time, History and International Law* (Leyden and Boston, 2007) pp. 27-41; Heinhard Steiger, 'From the International Law of Christianity to the International Law of the World Citizen. Reflections on the Formation of the Epochs of the History of International Law', *Journal of the History of International Law*, 3 (2001) pp. 180-93; Paul Vinogradoff, *Historical Types of International Law* (Leyden, 1923).

⁶ David Bederman, *International Law in Antiquity* (Cambridge, 2001) p. 6; Wolfgang Preisner, *Der Völkerrechtsgeschichte. Ihre Aufgaben und Methoden* (Wiesbaden, 1964); idem, 'Die Epochen der antiken Völkerrechtsgeschichte', *Juristenzeitung*, 23/24 (1956) pp. 737-44; Heinhard Steiger, 'Probleme der Völkerrechtsgeschichte', *Der Staat*, 26 (1987) pp. 103-26.; Karl-Heinz Ziegler, 'Die römischen Grundlagen des europäischen Völkerrechts', *Ius Commune*, 4 (1972) pp. 1-27; idem, *Völkerrechtsgeschichte*, pp. 1-4.

⁷ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, 2004); Yasuaki Onuma, 'When Was the Law of the International Society Born?', *Journal of the History of International Law*, 2 (2000) pp. 1-66.

jurists Baltasar de Ayala (1548-1584) and Alberico Gentili (1552-1608).⁸ Under the impact of the reappraisal of the cultural, social and political revival of the 12th and 13th centuries – known as the ‘Renaissance of the Twelfth Century’ –,⁹ some international legal historians moved back the origins of the modern State system to the Late Middle Ages.¹⁰

The latter view certainly has merit. The emergence of the sovereign State in Europe was a long and gradual process that started in the Late Middle Ages and would only come to full fruition after the French Revolution (1789). But this does not justify considering the long period from 1300 or one or two hundred years earlier, as a long phase of continuous growth of the sovereign State and of modern international law. In the history of the international legal order of Europe, an important caesura needs to be laid around 1500. The decades around the turn of the 16th century were marked by the collapse of the old medieval order of Europe.

Before the 16th century, the Latin West could still be considered a kind of political and legal unity. Although the Latin West had fallen apart into scores of kingdoms, secular and spiritual principalities and lordships as well as city-republics and consisted of literally thousands of legal circles, each with its own laws and courts, it also formed a hierarchical continuum of which all these numerous and diverse political and juridical entities were part. This order, to which since the Renaissance the term *respublica Christiana* was applied, stood under the supreme authority of the emperor and the pope. Since the High Middle Ages, the authority of the emperor had been effectively limited to the Holy Roman Empire – the Kingdoms of Germany and Italy – although other princes and kings granted the emperor a symbolic precedence. The pope

⁸ Ernest Nys, *Le droit de la guerre et les précurseurs de Grotius* (Brussels, 1882); James Brown Scott, *The Spanish Origin of International Law. Francisco de Vitoria and his Law of Nations* (Oxford and London, 1934). Scott included these and other precursors of Grotius in *The Classics of International Law* (Carnegie Institution, 40 vols., from 1911), in which their major treatises, with an English translation, were reproduced

⁹ Charles H. Haskins, *The Renaissance of the Twelfth Century* (Cambridge, Mass. and London, 1927).

¹⁰ Wolfgang Preiser suggested 1300 as a starting point: ‘Über die Ursprünge des modernen Völkerrechts’, in Erich Bruehl (ed.), *Internationalrechtliche und staatsrechtliche Abhandlungen. Festschrift für Walter Schatzel zum 70. Geburtstag* (Düsseldorf, 1960) pp. 373-87; idem, ‘Völkerrechtsgeschichte’, in Karl Strupp and Hans-Joachim Schlochauer (eds.), *Wörterbuch des Völkerrechts* (2nd edn., Berlin, 1962), vol. 3, pp. 693-5; idem, ‘History of the Law of Nations: Ancient Times to 1648’, pp. 736-7.

was still the supreme spiritual leader of the Latin West, an authority which extended into many aspects of the political and juridical life of Europe, including important matters of 'international' relations such as war and peace. In the *jus commune*, that amalgam of learned Roman law, canon law and some feudal law, the Latin West also had a common jurisprudence. For many matters of international relations, jurists, diplomats and rulers would refer to the learned texts of Roman, canon and feudal law. During the Middle Ages, there was no autonomous jurisprudence or literature of *jus gentium*. But many aspects of the relations between political entities that would later fall under the law of nations were dealt with by the glossators and commentators of Roman and canon law. Inasmuch as there was a jurisprudence of *jus gentium*, it was part and parcel of the *jus commune*, or the law at large. Whereas Roman law was mostly a professorial law and was almost nowhere in Europe applicable law, canon law was the law of the Church and was applied throughout the Latin West by all ecclesiastical courts. Inasmuch as the Church claimed and held jurisdiction in many issues relating to international relations, such as the justification of war, the enforcement of treaties sworn by oath and princely marriages, there was an effective *jus gentium*, enforced by the ecclesiastical courts, and in particular by the highest Church authorities, the pope and the papal court.¹¹

Between 1450 and 1550, three major changes brought the medieval legal order of Europe down. First, the decades before and after 1500 were marked by the rise of some major dynastic power complexes, foremost among which were Valois France and Habsburg Spain. By the end of the 15th century, France and Spain, then under the Catholic Kings Ferdinand VI of Aragon (1479-1516) and Isabella of Castile (1474-1504), were locked in a battle for hegemony

¹¹ Randall Lesaffer, 'The Medieval Canon Law of Contract and Early-Modern Treaty Law', *Journal of the History of International Law*, 2 (2000) pp. 178-98; idem, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law', *British Yearbook of International Law*, 73 (2002) pp. 103-39, at pp. 110-5; idem, 'Peace Treaties from Lodi to Westphalia' in Randall Lesaffer (ed.), *Peace Treaties and International Law in European History: From the End of the Middle Ages to World War One* (Cambridge, 2004) pp. 9-41, at pp. 9-13; James Muldoon, 'The Contribution of the Medieval Canon Lawyers to the Formation of International Law', *Zeitschrift der Savigny-Stiftung für europäische Rechtsgeschichte, kanonistische Abteilung*, 81 (1995) pp. 64-82, Ziegler, Römische Grundlagen; idem, 'The Influence on Medieval Roman Law on Peace Treaties', in Lesaffer, *Peace Treaties and International Law*, pp. 147-61.

over Italy, which in time was to expand into a struggle for hegemony in Western Europe. The Franco-Spanish great power conflict would remain one of the linchpins of the fabric of European politics until deep into the 17th century. The decades around 1500 also saw the revival of the crusader ideal and the call for unity of the Latin West in the face of the Ottoman threat. The conquest of Constantinople in 1453 had been the beginning of seven decades of westwards expansion by the Ottomans with the destruction of much of the Venetian maritime empire in Greece in the 1470s and 1480s, the conquest of Mameluk Syria and Egypt in 1516-1517, the conquest of Rhodes in 1522 and the conquest of Hungary in 1526 ending with the failed siege of Vienna in 1529. In this context, the old medieval ideal of 'universal monarchy' was revived. Some of the French kings as well as Charles V, Emperor, King of Spain and Lord of the Burgundian Netherlands (1516-1558), at some point claimed to be the secular head of the Latin West and therefore to be entitled to lead the external war effort of Christianity against the common enemy, the Turks. Hegemony over Italy, 'the garden of empire' in the words of the great Florentine poet Dante Alighieri (1265-1321), the seat of Christianity in the West as well as the logical launching base for any counteroffensive against the Turks, was the necessary precondition to vest and impose such a 'universal monarchy'. But with their rivalry over who was to lead the Latin West in a common war against the Turks, the two leading monarchs of the early 16th century, Charles V and Francis I (1515-1547) of France, saw the last serious attempt of restoring unity to failure and destroyed the final vestiges of imperial authority.¹² Henceforth, 'universal monarchy' would become a buzzword in the mouths and writings of those who opposed the ambitions to European hegemony by the leading great power of the age, first Spain (1530s to the Peace of the Pyrenees, 1659) and then France (after 1659).¹³

Second, there was the Reformation. By the second half of the 16th century, the unity of the Latin Church was lost. The northern half of Europe had rejected the authority of the pope and

¹² John M. Headley, 'The Habsburg World Empire and the Revival of Ghibellinism', *Medieval and Renaissance Studies*, 7 (1978) pp. 93-127; idem, *The Emperor and his Chancellor: A Study of the Imperial Chancellery under Gattinara* (Cambridge, 1983); Randall Lesaffer, 'Charles V, *monarchia universalis* and the law of nations (1515-1530)', *Legal History Review*, 71 (2003) pp. 79-123.

¹³ Franz Bosbach, *Monarchia universalis. Ein politischer Leitbegriff der frühen Neuzeit* (Göttingen, 1988).

had been converted to one of the protestant denominations. Religion, which for almost a millennium had been the fundament of the unity of the Latin West, was now the main cause of dissension. In some of the major countries of Europe, including the German Empire, France and the Netherlands, Catholics and Protestants became locked in a fierce battle for political control, quickly making religion one of the main dividing lines at the international level as well. On the legal side, the religious conflict destroyed one of the main fundaments on which the medieval order of the *respublica Christiana* had rested: that of the universal authority of canon law and of the ecclesiastical and the papal courts. As in the context of the learned *jus commune*, particularly so in matters of *jus gentium*, Roman, canon and feudal law had become inextricably wound up with one another, this also jeopardized the usefulness of the secular learned law as a source of authority. Moreover, under the influence of protestant and humanist jurisprudence – which in many countries such as France and the Netherlands were closely intertwined – a more national approach to ‘Roman’ law was taken, weakening its ‘universal’ character and uses.¹⁴

Third, the discoveries by the Spanish and the Portuguese and their conquest of territories in the East Indies and in the Americas put new challenges in the field of international relations. The claims to monopoly over navigation and commerce by the Spanish and Portuguese and their conquest of native lands in the Indies raised new questions for which new answers needed to be articulated. Moreover, existing European customs and doctrines which were vested in a common history and on the authority of Roman and canon law were irrelevant to the relations with the newly discovered peoples with whom there was no common past and who were neither Roman nor Christian. The need arose for a new common basis to vest international legal relations on.¹⁵

¹⁴ Donald R. Kelley, *Foundations of Modern Historical Scholarship: Language, Law and History in the French Renaissance* (New York, 1970); idem, ‘Civil Science in the Renaissance: Jurisprudence in the French Manner’, *Journal of the History of Ideas*, 3 (1981) pp. 261-76; idem, ‘Law’, in John H. Burns (ed.), *The Cambridge History of Political Thought 1450-1700* (Cambridge, 1991) pp. 66-94; Peter Stein, ‘Legal Humanism and Legal Science’, *Legal History Review*, 54 (1986) pp. 297-306; J. Witte, *Law and Protestantism: the Legal Teachings of the Lutheran Reformation* (Cambridge, 2002).

¹⁵ Anghie, *Imperialism, Sovereignty and the Making of International Law*, pp. 17-23; Steiger, ‘From the International Law of Christianity’, pp. 185-6.

By the second half of the 16th century, the medieval order of the *respublica Christiana* had collapsed and the Latin West was thrown into a deep political and legal crisis. Many of the old customs and doctrines with relation to war and peace, diplomacy, foreign trade and navigation might still be applied among European princes, but the common authority on which they were founded had crumbled. The authority of the pope and of ecclesiastical courts was less and less invoked in matters of war, peace and diplomacy. Treaty practice offers a clear illustration thereof. During the Late Middle Ages, the interpretation and enforcement of treaties, especially of treaties ratified by oath, fell under the application of canon law and the jurisdiction of the Church. In many treaties, direct reference was made to ecclesiastical and papal authority and ecclesiastical sanctions were invoked in case of a breach of treaty. Whereas it remained customary until the late 17th century to ratify treaties by oath, by the end of the 16th century almost all references to the jurisdiction of the pope and ecclesiastical institutions and sanctions had disappeared from treaty practice, also among catholic princes. Rarely, if ever, did princes appeal again to the papal courts to rule over a case of breach of treaty.¹⁶

b) *Jus publicum Europaeum*

The collapse of papal and ecclesiastical authority in the field of international relations had made the great princes and republics externally sovereign. In the absence of any higher authority of law making or law enforcement, they were now thrown upon their own devices to articulate a new legal order and to uphold it. It took more than a century for this to happen. Only after Westphalia did the new order, that of the *jus publicum Europaeum* (*droit public de l'Europe*) emerge. It took to the 18th century for it to be accomplished.

The century between 1550 and 1650 was an age of turmoil for the Latin West. Some of the major countries of Europe were plagued by political instability, civil unrest and even civil war. Some of the major conflicts of the period, such as the Eighty Years War (1567-1648) between Spain and its rebellious provinces of the Northern Netherlands, the French Wars of Religion

¹⁶ Lesaffer, 'Peace Treaties from Lodi to Westphalia', pp. 33-4.

(1562-1598) and the Thirty Years War (1618-1648) had political as well as religious causes. Over the 16th and 17th centuries, in most countries of Europe, with the exception of the Empire, kings and their governments were successful at strengthening the power of central government and the gradual elimination of old local and regional elites as independent power brokers and contenders for government. In most countries, this process of centralisation went through a series of political clashes and outright civil war. The 1640s and 1650s were particularly ripe with elite rebellions and other forms of civil war. Several of the major countries of Europe, including England (Civil War, 1641-1649), France (Fronde, 1648-1653) and Spain (Catalonia 1640-1653, Portugal 1640-1668, Naples 1647-1648) fell victim to armed revolt. These revolts, however they ended, would prove to be the last convulsions of protracted armed resistance by local elites against the centralisation of power. In all, during the century after 1550, conditions were hardly conducive for a new stable, international order to emerge. It would take to the second half of the 17th century before the conditions for this were sufficiently present.¹⁷

The Peace Treaties of Westphalia (1648)¹⁸ have been widely acclaimed as the turning point and the very constitution of the 'Westphalian' order of the sovereign States system and of the classical law of nations. Claims have been made to the extent that the Peace of Westphalia introduced and laid down the basic principles of the sovereign States system and its law of nations, such as the principle of the sovereignty and equality of States, the religious neutrality of the international order and the balance of power.¹⁹ The truth is that none of these principles were

¹⁷ Peter Zagorin, *Rebels and Rulers, 1500-1660* (2 vols., Cambridge, 1982).

¹⁸ The Westphalia Peace Treaties that ended the Thirty Years War were the Treaty of Munster of 24 October 1648 between the Emperor and the Estates of the Holy Roman Empire and the King of France and the Treaty of Osnabruck of that same date between the Emperor and the Estates of the Holy Roman Empire and the Queen of Sweden. On 30 January 1648, at Munster, the Spanish and the Republic of the United Provinces of the Northern Netherlands has also made peace, thus ending the Eighty Years War. Fritz Dickmann, *Der Westfälische Friede* (7th edn., Munster 1998); J.J. Poelhekke, *De Vrede van Munster* (Den Haag, 1948).

¹⁹ E.g. Richard A. Falk, 'The Interplay of Westphalia and Charter Conceptions of International Legal Order', in Richard A. Falk and Cyril E. Black (eds.), *The Future of International Legal Order* (Princeton, 1968) vol. 1, pp. 43-8; Leo Gross, 'The Peace of Westphalia, 1648-1948', *American Journal of International Law*, 42 (1948) pp. 20-41; Andrea Rapisardi Mirabelli, 'Le congrès de Westphalie. Ses négociations et ses résultats au point de vue de

introduced, or even appear as principles of international relations in the Westphalia Peace Treaties. At best, some related ideas can be found in the context of the internal political, constitutional and religious settlement among the Emperor and the Estates of the Empire that was part of the treaties. But these did not reflect on the law of nations, had little to do with State sovereignty and were hardly innovative.²⁰ Yet the Peace of Westphalia is an epochal event because it marked the end of the last great religious war and brought a relative form of stability to Central Europe, one of the main battlefields of the great powers of the age. As such, the Peace of Westphalia, together with the settlement of the great civil wars of the 1650s and 1660s assured the conditions of stability necessary to construct a new international legal order. It was rather *after* than *at* Westphalia that the 'Westphalian' order was born.

The classical law of nations, or the *jus publicum Europaeum*, was laid out in the decades between Westphalia and the Peace Treaties of Utrecht (1713). Its main sources were customs and treaties. The peace treaties coming out of the great multilateral peace conferences of the age, such as those of Nijmegen (1678/1679), Rijswijk (1697), Utrecht (1713), Vienna (1738) and Aachen (1748),²¹ were particularly important and laid down or incorporated the main principles of the political and legal order of Europe. Later treaties often referred to older treaties as the

l'histoire du droit des gens', *Bibliotheca Visseriana Dissertationum Ius Internationale Illustrantium*, 20 (1929) pp. 7-18.

²⁰ See footnote 4.

²¹ Whereas as the peace conferences were multilateral in the sense that many of the European powers participated, they resulted in a series of bilateral peace treaties. The first important exception to that was the Peace of Aachen (1748), ending the War of Austrian Succession. Heinz Duchhardt, 'Friedenskongresse im Zeitalter des Absolutismus – Gestaltung und Struktur', in Konrad Repgen (ed.), *Forschungen und Quellen zur Geschichte des Dreissigjährigen Krieges* (Munster, 1981) pp. 226-39; Krystyna Marek, 'Contribution à l'étude de l'histoire du traité multilatéral', in Emanuel Diez et al. (eds.), *Festschrift für Rudolf Bindschedler* (Bern, 1980) pp. 17-39. See J.A.H. Bots (ed.), *The Peace of Nijmegen – 1676-1678/79 – La Paix de Nimègue* (Amsterdam, 1980); Heinz Duchhardt (ed.), *Der Friede von Rijswijk 1697* (Mainz, 1998); Thomas R. Kraus, '*Europa sieht ten Tag leuchten ...*': *der Aachener Friede von 1748* (Aachen, 1998).

fundament for the new peace and expressly confirmed them. In the series of treaties thus named, the Westphalia Peace Treaties was only included in treaties relating to the Empire.²²

The classical law of nations was a law premised on the sovereignty of the State. It was designed to regulate the external relations of the sovereign princes and city-republics of Europe. As such, the classical law of nations could only emerge and unfold on the rhythm of the emergence of the sovereign State. State sovereignty has two dimensions, an external and an internal one. External sovereignty can be defined negatively as the absence of any higher authority. External sovereignty can be either absolute or relative. Absolute external sovereignty implies the absence of higher authority in relation to every aspect of public authority; relative external sovereignty means that it is limited to some parts of public authority, such as the right to wage war or make peace. The collapse of the *respublica Christiana* of the early 16th century had assured the main princes and city-republics of external authority in all important aspects of international political life. By 1550, Europe did exist out of a few dozen of externally sovereign powers.

But it would take more than another century for the main States of Europe to be well underway to become internally sovereign and it would take to the French Revolution (1789) and the 19th century for internal sovereignty to be truly accomplished. Internal sovereignty can be defined as the situation in which the sovereign power within the State – e.g. the king – is the sole source of all public authority; all other public institutions hold their power through delegation from the sovereign. Again internal sovereignty can be either absolute or relative, in the sense that it is limited to certain aspects of public authority. In his *Les six livres de la République* (1576), the French jurist Jean Bodin (1530-1596) considered a prince to be sovereign if he held exclusive power over seven essential State functions.²³ With regards international relations, internal sovereignty means that the central government monopolises all external relations of the State, such as the right to send or accredit diplomats, to make treaties and to make war.

²² Steiger, 'Grundgesetz für Europa', pp. 58-66.

²³ Julian Franklin, *Jean Bodin and the Rise of Absolutist Theory* (Cambridge, 1973); idem, 'Sovereignty and the Mixed Constitution: Bodin and his critics', in Burns (ed.), *Cambridge History of Political Thought 1450-1700*, pp. 299-344.

With few exceptions, the major political entities of Early-Modern Europe were monarchies. Some of the leading ones, such as France, Spain, Sweden or the Habsburg-Austrian complex, were composite monarchies. They consisted of several realms that were held in personal union by their common prince. Between 1500 and 1800, in most countries, princes and their governments gradually succeeded in strengthening the political and legal unity of their territories and enhancing their control over the different parts of their 'empires'. In some countries, such as England, this went much farther than in others. In the process, the old local and regional political and military elites were eliminated as independent power brokers at the national level and were absorbed in the apparatus of State.²⁴

After the revolts of the mid-17th century, central governments more or less monopolised the external relations of the State. This dramatically changed the setting of 'international relations.' Whereas during the Late Middle Ages, literally hundreds of the most different sorts of actors, from the emperor over kings, princes, lords of all kinds, bishops and abbots to city and town governments, were involved with matters of war, diplomacy and international trade, now these issues became the preserve of a few dozen princes and city-republic and their agents. Whereas during the Late Middle Ages, the law of nations had formed an integral part of the law at large, as it applied to all kinds of rulers and institutions, now it became the preserve of the sovereign holders of the highest public authority. As such, it became a distinct category of law, and of public law at that. This meant that concepts and rules of private law, which before were applied directly to international relations, now needed to be transferred from the domain of private law to that of the law of nations through a conscious process of analogy or adaptation.

State sovereignty might be the linchpin of the system of Europe of the late 17th and 18th centuries, but it is wrong to interpret the evolution of the law of nations from 1650 to 1800 one-sidedly in terms of the emergence of the sovereign State. The classical law of nations was as much an attempt to organise the system of sovereign States and limit the free arbiter of States as to accommodate them. The dynamic tension that came with this was inherent to the system. The fact that princes and States sometimes got away with the most blatant acts of aggression, such

²⁴ Richard Bonney, *The European Dynastic States, 1494-1660* (Oxford, 1991); Nicholas Henshall, *The Myth of Absolutism: Change and Continuity in Early Modern European Monarchy* (London and New York, 1992).

as in the case of the Prussian invasion and conquest of Silesia in 1740 and the Polish Partitions (1774, 1792 and 1795), indicates a failure of the system to reign in the ambitions of States but does not imply that it was not attempted or that these actions went undisputed.

What were, apart from State sovereignty, the main characteristics of the classical law of nations? First, the sovereign princes and rulers felt themselves to be part of a wider community. That community was by and large limited to Western, Central and Northern Europe as well as the Christian parts of Southern Europe. During the 17th and 18th centuries, it expanded to the east to include Russia. Whereas some European powers had extensive trade and diplomatic relations with the Ottoman Empire, the latter was not truly part of the European legal order.²⁵ Treaties and other diplomatic documents continued to make reference to overriding common interests and values to which the sovereign princes stated their adherence. Between 1500 and 1800, changes took place in relation to the terminology used in treaties to indicate the community of princes and these overriding interests and values. Until the end of the 17th century, Europe was referred to as *Christianitas, orbis Christiana or respublica Christiana*. Only during the 18th century did these direct references to Christianity fade away and make place for the term 'Europe'. In the preambles of many peace treaties of the 16th and 17th centuries, the desire to stop the shedding of Christian blood and thus to restore the unity of Christianity was voiced. Until the end of the 16th century, reference was made to the interests of religion and the Church as well as to the necessity of unity in the face of the Turkish threat. Over the 17th century, the latter two references disappeared; what was left was the expression of a vague desire to restore the peace and unity of Christianity. In 18th-century treaties, a new phrase was coined to refer to the overriding common interests and values to which princes had to submit. In many preambles and in some of the main articles of peace treaties of the 18th century, it was held that the conditions under which peace was made were instrumental to the upholding of the 'tranquillity and security of Europe.' In some cases, this was more than lip service to a noble ideal. More than once during the 18th

²⁵ Karl-Heinz Ziegler, 'The Peace Treaties of the Ottoman Empire with the European Christian Powers', in Lesaffer, *Peace Treaties and International Law*, pp. 338-64.

century, dynastic interests or even constitutional rules were set aside for the overriding purpose of attaining a stable peace.²⁶

Second, during the 18th century, the balance of power became one of the leading principles of the international order. Only a few treaties made direct reference to the 'équilibre de l'Europe,' but it was covered by the far more frequently voiced interest of safeguarding the 'tranquillity and security of Europe.' Safeguarding the balance of power was a precondition to the peace and the security of the sovereign States of Europe. The doctrine of the balance of power implied that no State would be allowed to become so powerful that it might outstrip any likely coalition of opponents and become hegemonic, at the European level or at the level of a subsystem. This balance was not to be achieved through actual equality between all States, but through the formation of equilibrated coalitions. When the balance was disrupted, the liberty and sovereignty of all States was felt to be at risk. The doctrine was inextricably linked to the concept of State sovereignty. It also served to justify war, and even preventive war. But at the same time, the doctrine could also serve to reign in the freedom of States. The most famous example thereof was the compromise from the Peace of Utrecht (1713) on the Spanish succession, whereby the French and Spanish Bourbons had to accept the curbing of their dynastic rights in the name of European peace and the balance of power.²⁷

²⁶ Lesaffer, 'Peace Treaties from Lodi to Westphalia', pp. 29-34; idem, 'Paix et guerre dans les grands traités du dix-huitième siècle', *Journal of the History of International Law*, 7 (2005) pp. 25-43.

²⁷ Peace Treaty of Utrecht between France and Great Britain of 11 April 1713, Art. 6 in Clive Parry, *Consolidated Treaty Series* (Dobbs Ferry, 1969, further CTS) vol. 27, pp. 482-3; Peace Treaty of Utrecht between Great Britain and Spain of 13 July 1713, Art. 2 in CTS, vol. 28, pp. 299-300. On the balance of power: Herbert Butterfield, 'The Balance of Power', in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations: Essays in the Theory of International Politics* (London, 1966) pp. 132-48; Heinz Duchhardt, 'The Missing Balance', *Journal of the History of International Law*, 2 (2000) pp. 67-72; Evan Luard, *The Balance of Power: The System of International Relations, 1648-1815* (Basingstoke, 1992); Arno Strohmeyer, *Theorie der Interaktion. Das europäische Gleichgewicht der Kräfte in der frühen Neuzeit* (Vienna, Cologne and Weimar, 1994); Martin Wight, 'The Balance of Power and International Order', in Alan James (ed.), *The Bases of International Order* (London, 1973) pp. 85-115.

Third, the sanctity of treaties remained an overriding principle of the law of nations. Faith to the given word was considered the basic fundament of the international order and the breaking of treaties one of the most perfidious acts, which was not lightly committed. The Swiss diplomat Emer de Vattel (1714-1767) was not alone in considering the upholding of treaties a 'sacred' duty, in which all nations had an interest. The perpetrator was to be considered 'a public enemy which attacks the foundations and the common peace and security of Nations.'²⁸ So, when princes went to war, they were very meticulous in explaining that they did not act in contravention to an existing peace treaty, but were resorting to war either because their opponent had first broken the conditions of the peace or that they did so for a cause which did not contravene with existing treaty relations or obligations.

Fourth, many peace and alliance treaties of the late 17th and of the 18 centuries also provided for third-power guarantees. Under the provisions thereof, third powers promised to safeguard and help enforce the conditions of a treaty by rendering aid to the victim of a breach of treaty. In some major peace treaties of the 17th century, the power which had mediated the treaty was invited apart from other powers which were not expressly nominated.²⁹ Later, the role of guarantor was more generally assumed by the great powers, regardless of having played a formal role of mediator during the peace conference. Over the 18th century, some multilateral alliances were made with the specific purpose of upholding pre-existing peace treaties. The Triple, later Quadruple Alliance of 1717/1718 to uphold the Peace of Utrecht is the main example thereof.³⁰

²⁸ Emer de Vattel, *Le droit des gens ou principes de la Loi naturelle* (1758, ed. and transl. Albert de La Pradelle and Charles G. Fenwick, *The Classics of International Law*, 3 vols., Washington, 1916, for another English edn. Béla Kaposy and Richard Whatmore, *Natural Law and Enlightenment Classics*, Indianapolis, 2008) 2.15.222.

²⁹ Treaty of Nijmegen between France and the Republic of 10 August 1678, Art. 20, CTS vol. 14, p. 365; Treaty of Rijswijk between France and the Republic of 20 September 1697, Art. 20, CTS vol. 21, p. 347; Treaty of Rijswijk between France and Spain of 20 September 1697, Art. 36, CTS vol. 21, p. 453; Treaty of Rijswijk between the Empire and France of 30 October 1697, Art. 54, CTS, vol. 22, p. 5.

³⁰ Treaty of The Hague of 4 January 1717, in CTS vol. 30, p. 65; Treaty of London of 22 July 1718, CTS vol. 30, p. 415.

Fifth, the doctrine of the balance of power and the guarantee system reflected the recognition of the special role of the great powers in the upholding of the 'tranquillity and security of Europe.' In taking on the role of guarantor of the European peace order, the great powers assumed and were granted a special responsibility for the European order and special rights to intervene, including through the use of force, to do so. To some extent, this prefigured the 'Concert of Europe' of the 19th century under which the five great powers of Europe assumed the role of guaranteeing and managing the order of Europe as laid down at the Congress of Vienna (1814/1815).³¹

2. *The law of nations as an autonomous discipline*

a) Neo-scholastics and humanists

Before the 16th century, there was no autonomous jurisprudence of the law of nations with its own text canon and literature. Since the 11th century, the glossators and commentators of Roman and canon law had written numerous glosses, commentaries, legal opinions and even some treatises on matters relating to diplomacy, war, trade and navigation but they had not forged it into a self-standing branch of the law. As these matters were the concern of numerous and very diverse political players, ranging from kings to petty lords, the *jus gentium* was not yet the preserve of just one category of political entities. This was only to change after the sovereign State had emerged and after central governments had monopolised the State's external relations. Before this, the writings of Roman and canon lawyers relevant to diplomacy, war, trade and navigation were fully part of the law at large. They were to be found spread through their glosses and commentaries on the Roman and canon law sources. Concepts, principles and rules of Roman, canon and feudal law, as well as of private and public law were used without much

³¹ Andreas Osiander, *The States System of Europe 1640-1990: Peacemaking and the Conditions of International Stability* (Oxford, 1994); Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge, 2004).

discretion to address questions relating to *jus gentium*. The learned doctrine had a direct impact on international practices and was a major source of law as it was invoked in numerous cases before ecclesiastical courts or arbiters; Roman law was directly applied to matters of trade and navigation. Apart from Roman and canon lawyers, theologians also dealt with matters of war and peace in their writings. For some subjects, one could distinguish between a theological and a Romanist tradition, with the canon lawyers often in the middle. The main difference between these traditions was that the theologians, and canon lawyers, were more concerned with the effects of human behaviour upon one's immortal soul, whereas the Roman lawyers, and canon lawyers, were more concerned with its effects here and now. So the theologians would ask the question what the consequences for waging an unjust war were for one's salvation or damnation, whereas Roman lawyers would look at the rights one could or could not acquire through unjust war.

The collapse of the religious unity of Europe during the first half of the 16th century destroyed much of the authority on which the doctrine, and thus the practices, of the *jus gentium* had rested. This had two paradoxical consequences. On the one hand, after 1500, doctrine lost much of its direct impact on the practices of international relations. Far fewer disputes between princes and republics were settled in courts or through arbitral practice, where appeal to jurisprudence used to be made. An important exception needs to be made for the continuous role played by prize courts and courts of admiralty over cases of maritime warfare, privateering, piracy and matters of navigation in general; in these courts, Roman law continued to have its impact felt. Also, some cases about diplomatic immunity made it into court.³²

On the other hand, the 16th and 17th centuries saw the emergence of the law of nations as an autonomous scholarly discipline with its own literary tradition. Before 1500, few self-standing treatises were written on matters pertaining to the *jus gentium*. Several Roman and canon lawyers wrote treatises on subjects of war, peace and diplomacy, but their scope was

³² Charles de Martens, *Causes célèbres du droit des gens* (2 vols., Leipzig, 1827) and idem, *Nouvelles causes célèbres du droit des gens* (2 vols., Leipzig, 1843).

rarely limited to these issues.³³ During the 14th and 15th centuries, some treatises were written with a more exclusive focus on the laws of war and peace.³⁴ Outside the field of the learned law, some treatises were written on the code of chivalry.³⁵ Humanist jurisprudence had given a great stimulus to the writing of treatises as autonomous monographs which dealt with a subject of law in a more or less exhaustive and systematic way. From the mid of the 16th century onwards, this spilt over into the field of the law of nations as an increasing number of self-standing treatises on aspects of the laws of war and peace were written and published.

Modern scholars have classified the writers of the law of nations of the 16th and early 17th centuries by pitting neo-scholastic against humanist writers. The – Spanish – theologians and jurists of the Second Scholastic, or the School of Salamanca, continued the Aristotelian tradition of Thomas Aquinas (1225-1274). The two main protagonists were two theologians, the Dominican Francisco Vitoria and the Jesuit Francisco Suarez. In two famous *Relectiones* from the 1530s, *De Indis* and *De jure belli*, Vitoria addressed the question of the justice of the Spanish conquests in the Americas.³⁶ Suarez laid out his doctrine of natural law and the law of nations in several works, including his *opus magnum, De Legibus ac Deo Legislatore* (1612).³⁷ Other

³³ Most of these treatises are to be found in the great collection of treatises from Venice, 1583-1586 known as the *Tractatus Universi Juris* (18+4 vols.) and in the collection of treatises which were censured out because of their association with Protestantism, see in particular: *Tractatus Universi Juris Extravagantes, vol. 1: De dignitate et potestate seculari* (Venice 1548, Naples 2005).

³⁴ The canon lawyer Giovanni da Legnano († 1383) wrote a treatise on war, reprisals and duels, Giovanni da Legnano, *Tractatus de bello, de represaliis et de duello* (1360, ed. and transl. Thomas E. Holland, The Classics of International Law, Oxford, 1917). In *Tractatus Universi Juris*, vol. 16, three treatises on war (*De bello*) were included, namely those by Johannes Lupus, Martinus Garatus Laudensis and Francisco Arias. Garatus Laudensis (15th century) also wrote a treatise on treaties, *De confoederatione, pace et conventionibus principum* (ed. Alain Wijffels, in Lesaffer, *Peace Treaties and International Law*, pp. 412-447).

³⁵ Most famously, Honoré de Bonet, *L'arbre des batailles* (c. 1386, transl. G.W. Coopland, Liverpool, 1949).

³⁶ Edn 1696, ed. and transl. Ernest Nys and John P. Bate, The Classics of International Law, Washington, 1917; ed. and transl. Anthony Pagden and Jeremy Lawrance, *Vitoria: Political Writings* (Cambridge Texts in the History of Political Thought, Cambridge, 1991) pp. 231-327.

³⁷ Transl. Gwladys L. Williams, Anna Brown and John Waldron, The Classics of International Law, 2 vols., Oxford and London, 1944.

important neo-scholastics include the Dominican theologians Juan de la Peña (1513-1565), Domingo de Soto (1494-1560), the Salamanca theologian and canon lawyer Diego de Covarruvias (1512-1577), the jurist Fernando Vazquez de Menchaca (1512-1569) and the Jesuit theologian Luis de Molina (1535-1600).

Under the terms 'humanists' and 'humanism' fall a far wider group of scholars and a far wider range of views. The humanist tradition includes men of letters such as Desiderius Erasmus (c. 1469-1536) and Justus Lipsius (1547-1606), the earliest political writers who took some of their ideas from classical texts and humanist philosophy such as Nicolo Machiavelli (1469-1527) and Jean Bodin, protagonists of humanist jurisprudence such as Andrea Alciato (1492-1550) and François Hotman (1524-1590) and jurists who were influenced by humanism such as Baltasar de Ayala and Alberico Gentili. Ayala, a military judge in the Spanish Army of Flanders during the early stages of the Eighty Years War, wrote a substantial treatise on the laws of war and military discipline.³⁸ Gentili, a protestant jurist who had to flee Italy and became Regius Professor of Civil Law at Oxford, was the author of three treatises on matters of the law of nations. His *De jure belli libri tres* was the main exposition of the laws of war and peace before Grotius's *De jure belli ac pacis*.³⁹ Another main treatise on the laws of war and military discipline written in the 16th century was that by the Italian jurist Pierino Belli (1505-1575), who still belonged to the Bartolist tradition of Roman law and was less influenced by humanism.⁴⁰

One should be careful not to take the distinction between neo-scholastics and humanists too far. It is true that, inasmuch as they were mainly theologians, the neo-scholastics continued in the tradition of Aristotelian and Thomist theology, but they also made ample use of late-

³⁸ Baltasar de Ayala, *De Jure et Officiis Bellicis et Disciplina Militaris* (1584, ed. and transl. John Westlake and John P. Bate, 2 vols., The Classics of International Law, Washington 1912).

³⁹ Alberico Gentili, *De legationibus libri tres* (1594, ed. and transl. Ernest Nys and Gordon J. Laing, The Classics of International Law, 2 vols., Oxford, 1924); idem, *De jure belli libri tres* (1598, edn. 1612, ed. and transl. Coleman Philippon and John C. Rolfe, 2 vols., The Classics of International Law, Oxford and London, 1933); idem, *Hispanicae Advocationis libri duo* (1613, edn. 1661, ed. and transl. Frank Frost Abbot, The Classics of International Law, Oxford 1921).

⁴⁰ Pierino Belli, *De re militari et bello tractatus* (1563, ed. and transl. Arrigo Cavaglieri and Herbert C. Nutting, 2 vols., The Classics of International Law, Oxford and London, 1936).

medieval Roman and canon law texts and, particularly the Jesuits Molina and Suarez, were not untouched by humanist ideas. The humanists, especially the jurists among them, made references to the medieval legal rather than the theological tradition, but they too did not throw away the whole Aristotelian-Thomist tradition, which had become deeply imbedded in medieval legal thought.⁴¹ The main innovative push of their thought came, however, from classical rhetorical (Cicero, Quintilian), philosophical (Platonism and Neo-Platonism, Stoicism), and historical (Livy, Tacit) texts and traditions.

Recently, some authors have attempted to map out the main differences between the views of neo-scholastics and humanists.⁴² Although these attempts have some merit, one should be careful not to overstate the opposition between the two groups. These were not two monolithic schools but broad, and at times, overlapping traditions.

The neo-scholastics reached back to the Thomist concept of natural law. According to Vitoria, all mankind formed a natural community which has been preordained by divine will and was premised on the common good of all mankind. It was ruled by the principles of natural law (*jus naturale*), which was inherent to human nature, was considered common to all mankind and offered common ground to base legal relations among all nations of the world on. The law of nations (*jus gentium*) was derived from it. The law of nations did, however, also contain rules which could not be directly derived from it but were manmade. These rules derived from the consent of the greater part of the world (*consensus maioris partis totius orbis*), a consent based on a shared concern for the common good and a common understanding of the rationality of the maxims of natural law. This law of nations was to be found in customs and treaties, but was ultimately subject to the law of nature. Suarez's theory was far more radical as he rejected the notion of a natural world community to which States were subject. The law of nations, which was

⁴¹ James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford 1991).

⁴² Diego Panizza, 'Political Theory and Jurisprudence in Gentili's *De Iure Belli*: The great debate between 'theological' and 'humanist' perspectives from Vitoria to Grotius', *International Law and Justice Working Papers* 15/5 (2005), at www.iilj.org/publications/2005-15Panizza.asp; Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford, 1999).

to be found in customs and treaties, was founded on the consent of States, but this was not dictated by the maxims of natural law. Suarez introduced a truly positive law of nations. This raised the question of the binding character of the law of nations. How could the binding character of a rule be guaranteed if it was based on voluntary consent? The answer to this, provided by Suarez, was that natural law stipulated the binding character of promises, and thus of rules based on consent. In this way, natural law underpinned the positive law of nations.⁴³

Many of the humanist jurists also put human nature and natural law centre-stage in their thought, but under the influence of the Roman rhetorical tradition and Tacitism, they had a far more relaxed view on the impositions made on human behaviour by natural law. For the more radical among the humanists, self-preservation was the primary dictate and duty of natural man. As the law of nations was the law of nature applied to princes and States and the State thus became the embodiment of natural man – a conceptual leap which was only really made by Grotius but was already lurking in the thought of jurists such as Alciato and Gentili –, self-preservation and not the dictates of the common good became the foremost purpose of the State. By consequence, humanists had an easier time at finding justification for preventive war or

⁴³ Camilo Barcia Trelles, 'Francisco Suarez (1548-1617)', *Receuil des Cours de l'Académie de Droit International*, 43 (1933) pp. 385- 551; Yves de la Brière, *La conception de droit international chez les théologiens catholiques* (Paris, 1930); J.A. Fernandez-Santamaria, *The State, War and Peace : Spanish Political Thought in the Renaissance 1516-1559* (Cambridge, 1977); Heinz-Gerhard Justenhoven, *Francisco de Vitoria zu Krieg und Frieden* (Cologne, 1991); Joseph Kohler, 'Die spanische Naturrechtslehrer des 16. und 17. Jahrhunderts', *Archiv für Rechts- und Wirtschaftsphilosophie*, 10 (1916/1917); James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (Oxford and London, 1934); Jozef Soder, *Die Idee der Völkergemeinschaft und die philosophische Grundlagen des Völkerrechts* (Frankfurt, 1955); idem, *Francisco Suarez und das Völkerrecht. Grundgedanken zu Staat, Recht und internationalen Beziehungen* (Frankfurt, 1973); Antonio Truyol y Serra, *Die Grundsätze des Staats- und Völkerrecht bei Francisco de Vitoria* (Zürich, 1947); Laurens Winkel, 'The Peace Treaties of Westphalia as an Instance of the Reception of Roman Law', in Lesaffer, *Peace Treaties and International Law*, pp. 222-37.

European imperialism than the neo-scholastics had, although these too devised a justification for the Spanish and Portuguese expansion in the Indies and the Americas.⁴⁴

b) Naturalists and positivists

The Dutch humanist Hugo Grotius authored two important treatises on the law of nations. In 1604, he published *De jure praedae*, a treatise on the law of plunder in defence of the capture by the recently founded Dutch East-India Company (V.O.C.) of a Portuguese ship in the East Indies. From this, he in 1609 extracted his *Mare Liberum*, in which he argued for the freedom of navigation on the high sea. In 1625, while living as an exile in France, he published *De jure belli ac pacis libri tres*.⁴⁵ As opposed to *De jure praedae*, the text of which was lost until 1864 – except for *Mare Liberum* –, this book went through many re-editions and became the most influential textbook on the law of nations until the middle of the 18th century. It was this work that won Grotius the – disputed – title of ‘father of the law of nations.’⁴⁶

⁴⁴ Benedict Kingsbury and Benjamin Straumann (eds.), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford, 2010); Tuck, *The Rights of War and Peace*, pp. 16-50.

⁴⁵ Hugo Grotius, *De jure praedae commentarius* (1604, transl. Gwladys L. Williams, The Classics of International Law, 2 vols., Oxford and London, 1950; for another English version, ed. Martine van Ittersum, Natural Law and Enlightenment Classics, Indianapolis, 2006); idem, *Mare liberum* (1609, for an English version, ed. David Armitage, Natural Law and Enlightenment Classics, Indianapolis, 2004); idem, *De jure belli ac pacis libri tres* (1625, edn. 1646, transl. Francis W. Kelsey, The Classics of International Law, 2 vols., Washington, 1913; for another English version, ed. Richard Tuck, Natural Law and Enlightenment Classics, 3 vols., Indianapolis, 2005).

⁴⁶ On the life of Grotius: C.S. Edwards, *Hugo Grotius, The Miracle of Holland: A Study in Political and Legal Thought* (Chicago, 1981); Henk Nellen, *Hugo de Groot. Een leven in strijd om de vrede, 1583-1645* (Amsterdam, 2007); C.G. Roelofsen, ‘Grotius and the International Politics of the Seventeenth Century’, in Bull, Kingsbury and Watson, *Grotius and International Relations*, pp. 95-131; Martine van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595-1615)* (Leyden and Boston, 2006). On the relation between *De jure praedae* and *De jure belli ac pacis*, Benjamin Straumann, *Hugo Grotius und die Antike. Römisches Recht und römische Ethik im frühneuzeitlichen Naturrecht* (Studien zur Geschichte des Völkerrechts 14, Baden Baden, 2007).

Whereas his 'precursors' only dealt with some aspects of the law of nations or discussed the law of nations in the context of a more general work, Grotius's *De jure belli ac pacis* was the first somewhat comprehensive treatise on the law of nations. Apart from the laws of war and peace properly speaking – the latter word referring to the law of peacemaking after war – Grotius also discussed other subjects such as treaty law and diplomatic law. The exposition was, however, not strictly limited to law applicable to rulers and States, but was imbedded in a general exposition of natural law, applicable to individuals as well. In this sense, Grotius's treatise was a precursor to the great treatises *De jure naturae et gentium* by the main natural law philosophers of the late 17th and early 18th centuries. With Grotius as with other writers, many concepts and rules from the medieval tradition of canon and Roman (private) law found their way into the new law of nations through the mediation of natural law, which consisted of the main principles and most common precepts of property, contract and tort law.

Since decades, modern students of Grotius have been debating whether Grotius was indebted to humanism or to neo-scholasticism. The truth of the matter is that Grotius was eclectic in the use of his sources and was not concerned with this labelling. Being a renowned man of letters and humanist himself, he made ample use of the humanist classical text canon and of the writings of humanist jurists, but he also made ample use of medieval theological, canonist and Romanist literature and of the writings of some of the neo-scholastics.⁴⁷

Grotius's merit was not to have 'invented' a new law of nations. He was above all a brilliant eclectic and system-builder. His main contribution is therefore to have constructed a more or less consistent and logical system of the law of nations out of the inheritance of Antiquity, the medieval traditions of theology, canon law and Roman law and the writings of the humanists and neo-scholastics of the century before.

⁴⁷ See in particular, his references in the *Prolegomena* to *De jure belli ac pacis* 38-56. Robert Feenstra, 'Quelques remarques sur les sources utilisées par Grotius dans ses travaux de droit naturel' in *The World of Hugo Grotius (1583-1645). Proceedings of the International Colloquium ... Rotterdam 6-9 April 1981* (Amsterdam and Maarssen, 1984) pp. 65-81.

Whereas Grotius's thought about the substance of natural rights and obligation and about the laws of war and peace is permeated by the humanist concern with self-preservation,⁴⁸ for his formal system of the law of nations he was deeply indebted to the neo-scholastic tradition of natural law. Grotius distinguished the law of nations from the law of nature. Whereas the latter was applicable to all, the former was only applicable to nations and their rulers.⁴⁹ Grotius further distinguished between two laws of nations, according to their sources. The *jus gentium naturale* or *primarium* derived from the law of nature, and thus ultimately, from divine will. The *jus gentium voluntarium* or *secundarium* was based on the consent of the peoples. The binding character of these rules was vested in the binding of promises under natural law ('pacta sunt servanda'). The *jus gentium voluntarium* was positive, man-made law but it was not a completely autonomous category of law. Just as Vitoria before him, Grotius acknowledged that the general consent of all the nations would never be given to a rule that contradicted the rationality of the law of nature. Moreover, the positive law of nations could never allow what the law of nature prohibited.⁵⁰

The distinction between natural and positive law of nations was there to remain and became one of the linchpins of the doctrine of the law of nations. To Grotius, as to many of his successors of the 17th and 18th centuries, the natural law of nations was the domain in which the

⁴⁸ Panizza, *Political Theory and Jurisprudence in Gentili's De Iure Belli*; Tuck, *The Rights of War and Peace*, pp. 78-108.

⁴⁹ Grotius, *De jure belli ac pacis*, Prol. 1.

⁵⁰ Roberto Ago, 'Le droit international dans la conception de Grotius', *Recueil des Cours de l'Académie de Droit International*, 182 (1983) pp. 375-98; Alfred Dufour, Peter Haggemacher et Jiri Toman (eds.), *Grotius et l'ordre juridique international* (Paris, 1985); Grewe, *Epochs of International Law*, pp. 194-5; Peter Haggemacher, *Grotius et la doctrine de la guerre juste* (Paris, 1983); Hartmut Schiedermaier, 'Hugo Grotius und die Naturrechtsschule', in Bodo Börner and Hermann Jahrreis (eds.), *Einigkeit und Recht und Freiheit. Festschrift für Karl Carstens* (Cologne, 1984-1985) vol. 2, pp. 477-96; Antonio Truyol y Serra, 'Grotius dans ses rapports avec les classiques espagnols du droit des gens', *Recueil des Cours de l'Académie de Droit International*, 182 (1983) pp. 431-51; W. van der Vlucht, 'L'œuvre de Grotius et son influence sur le développement du droit international', *Recueil des Cours de l'Académie de Droit International*, 7 (1925) pp. 399-509; Hans Wehberg, 'Die Unterscheidung von Natur- und Völkerrecht in der Lehre von H. Grotius', in Hans Kruse and Hans G. Seraphim. (eds.), *Mensch und Staat in Recht und Geschichte. Festschrift für Herbert Kraus* (Kitzingen and Main, 1954) pp. 227-32.

precepts of natural justice and reasonableness reigned supreme. The positive law of nations was founded on the consent of nations and was to be found in customs and treaties. The precepts of natural law were only binding in conscience and on the eternal soul (*in foro interno*). Reckoning would only follow at the Final Judgment before Gods' court. To religious men such as Grotius and many of the rulers, diplomats and writers of the 17th and 18th centuries, this was the forum that counted. The voluntary law of nations was binding upon men in the present and was externally enforceable through human sanctions. Whereas it could, at least according to some writers among which Grotius, not cut itself completely loose from the exigencies of natural justice, it could relax its impositions to a more realistic level and have a more pragmatic intake. As such, the dichotomy between natural and positive law continued those between medieval theologians and lawyers and between neo-scholastics and humanists.⁵¹

Some of the major treatises on the law of nations of the 17th and 18th centuries were written by the leading representatives of Modern School of Natural Law. Among these Samuel Pufendorf (1632-1694), Gottfried Wilhelm Leibniz (1646-1716), Johann Gottlieb Heineccius (1681-1741), Jean Barbeyrac (1674-1744), Jean-Jacques Burlamaqui (1694-1748) and Christian Wolff (1679-1754) need to be mentioned. Pufendorf was one of the most radically consequential naturalists. Grotius, Leibniz and others sought the precepts and rules of natural law in the examples of the ancients, in the classical text canon and/or in Roman and canon law. They considered these sources to be *ratio scripta* (written reasonableness) and thus to embody natural reason and justice. Pufendorf made much less use of external sources and attempted to mentally construct the laws of nature and of nations through a purely rational process of deduction. Moreover, Pufendorf rejected the existence of a binding positive law of nations. The law of nations was to be directly derived from natural law, and it was binding upon States as it was on men.⁵²

⁵¹ Randall Lesaffer, 'Gentili's *jus post bellum* and Early-Modern Peace Treaties', in Kingsbury and Straumann, *Roman Foundations*.

⁵² Samuel Pufendorf, *Elementorum Jurisprudentiae Universalis libri duo* (1660, edn. 1672, ed. and transl. Hans Wehberg and William A. Oldfather, *The Classics of International Law*, 2 vols., Oxford and London, 1931); idem, *De jure naturae et gentium libri octo* (1672, edn. 1688, ed. and transl. Walter Simons and C.H. and William A.

Christian Wolff's great treatise on the laws of nature and of nations, *Jus naturae methodo scientifica pertractata* (1740-1748),⁵³ was translated into French, amended to include some of his own ideas and made more accessible for the general public by the Swiss diplomat Emer de Vattel. His *Le droit des gens ou principes de la loi naturelle* (1758) quickly drove the work of the great German philosopher to the shadows and was added to the works of Grotius and Pufendorf as one of the seminal textbooks of the law of nations in Europe. Vattel's work would have great impact on the emerging discipline of international law in the United States and would remain influential until deep in the 19th century.⁵⁴

Wolff's and Vattel's work represent the mainstream in many of the debates on the law of nations on the 18th century. Their system held on to the dualism that was essential to the jurisprudence of the law of nations since Grotius, that of a distinction between a natural and a positive law of nations, between a sphere of natural justice and one of externally enforceable law. Vattel (and Wolff) distinguished four categories of law of nations. First, there was the natural or necessary law of nations. This was the law of nature as applied and adapted to nations. Second, there was the voluntary law of nations. It was general in application, common to all nations. Vattel ranked this together with the other two categories as positive law, but it was not truly that. It found its expression in the common behaviour of States, but it was also constrained by natural law. Its legal basis was the common consent of States, which was presumed, not established. It could modify and thus deviate from the necessary law of nations, but it could not contradict it. If it did, consent could not be presumed, so Vattel implied.⁵⁵ Next came the two categories of

Oldfather, *The Classics of International Law*, 2 vols., Oxford and London, 1934); idem, *De officio hominis et civis juxta legem naturalem* (1673, edn. 1682, ed. and transl. Walther Schücking and Frank G. Moore, *The Classics of International Law*, 2 vols., Oxford 1927, also ed. and transl. James Tully and Michael Silverthorne, *Samuel Pufendorf. On the Duty of Man and Citizen According to Natural Law*, Cambridge Texts in the History of Political Thought, Cambridge, 1991 and eds. Ian Hunter and David Saunders, *Natural Law and Enlightenment Classics*, Indianapolis, 2003).

⁵³ Christian Wolff, *Jus gentium methodo scientifica pertractatum* (1749, edn. 1764, ed. ad transl. Otfried Nippold and Joseph H. Drake, *The Classics of International Law*, 2 vols., Oxford and London, 1934).

⁵⁴ Mark W. Janis, *America and the Law of Nations 1776-1939* (Oxford, 2010).

⁵⁵ Vattel, *Le droit des gens, Préliminaires*, 21 and 26.

arbitrary law of nations, which were particular in application and thus only applied to those States which had given their consent: conventional law of nations, to be found in treaties, based on express consent and customary law of nations, based on tacit consent. These were truly positive law as they were based on the free arbiter of States.⁵⁶

From the second half of the 17th century onwards, a growing number of treatises on the positive law of nations as it appeared in treaties and customs was published. Modern scholars have often distinguished between natural lawyers and positivists among the writers of the 17th and 18th centuries. Mostly, the positivists are styled as opponents of the natural lawyers because of their alleged rejection of natural law and justice. In truth, most of the authors of treatises on the positive law of nations acknowledged the existence and the relevance of natural law and justice and even gave them a place in their system, but they simply had their focus elsewhere. Richard Zouche (1590-1661), one of the successors of Gentili on the Regius Chair of Civil Law in Oxford, the German diplomat Samuel Rachel (1628-1691), the German professor Johann Wolfgang Textor (1638-1701), the Dutch magistrate Cornelius van Bynkershoek (1673-1743), the French cleric Gabriel Bonnot de Mably (1709-1785), the German professor Johann Jakob Moser (1701-1785) and the German professor and statesman Georg Friedrich von Martens (1756-1821) rank among the foremost 'positivist' writers of the classical law of nations. Another, important consequence of the turn to the positive law of nations was the publication of collections of treaties and other diplomatic documents from the end of the 17th century onwards. The German philosopher and jurist Leibniz, himself a protagonist of the School of Natural Law, in 1693 published a collection of European treaties ranging from 1096 to 1497, to which he added a supplement in 1700.⁵⁷ His work, as that of others, was surpassed by the huge collection by Jean Dumont (1666-1727) of European treaties since the Early Middle Ages.⁵⁸ Over the late 17th and

⁵⁶ Vattel, *Le droit des gens*, Préface, pp. x-xi, *Préliminaires*, 7, 21, 24-27. Emmanuelle Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (Paris, 1998).

⁵⁷ Gottfried Wilhelm Leibniz, *Codex juris gentium diplomaticus* (Hannover, 1693); idem, *Mantissa codicis juris gentium diplomatici* (Hannover, 1700).

⁵⁸ Jean Dumont, *Corps universel diplomatique du droit des gens* (8 vols., Amsterdam and The Hague, 1726-1731; 5 supplements, 1739).

18th centuries, several national treaty collections were published. At the end of the century, Martens started with a collection of treaties since 1761.⁵⁹

3. *The sovereign State as a war machine*

a) *The jus ad bellum*

War was an endemic feature of life in Early-Modern Europe. The Early-Modern sovereign States were first and foremost war machines, designed to mobilise as many resources as possible for waging war, spending the majority of the public budget on the military even in times of peace. The drive behind this was dynasticism. At the beginning of our period, most of the dynasties that ruled the major countries of Europe only had a tenacious hold on their lands. Military glory and expansion, and the resources and opportunities this created to enhance royal power and to buy the support of the noble elite, were central to the survival and stability of the monarchy. The Military Revolution of the 16th and 17 centuries, with the generalisation of the use of gun power and the introduction of the *trace italienne* in fortress building, increased the scale and costs of warfare on land and sea manifold. This certainly helped kings and princes to break the military power of local and regional power brokers and to monopolise warfare and, with time, international relations to the exclusion of all other powers within the State. But it also forced them to set up an ever stronger and more effective bureaucracy and fiscal apparatus, further enhancing the financial needs of the State and bringing them on a collision course with local and regional elites. The consequence of this was a kind of vicious circle according which princes had to strengthen their military and bureaucratic apparatus, leading to an increase of the likelihood and the scale of internal conflict and of international war, making it necessary further to expand

⁵⁹ Georg Friedrich von Martens, *Recueil des principaux traités d'alliance, de paix, de trêve, de neutralité, de commerce, de limites, d'échange, etc. ... depuis 1761 jusqu'à présent* (7 vols., Göttingen, 1791-1801), supplemented by different other series.

the State apparatus. The rising costs of war also enlarged the scale and scope of war in yet another way. Whereas during the Middle Ages, wars had been fairly limited affairs between rulers and their armies, war now became the affair of the whole State. As the costs of war rose, the need to recuperate part thereof from the enemy grew and systematic plundering, looting and taxing the enemy became one of the crucial occurrences of war. Moreover, the economy of the enemy was much more targeted than before, on land and particularly on the sea.⁶⁰

By consequence, war became far more disruptive than it had before. By the late 16th century it had become customary at the inception of a war to take a series of measures putting an end to normal relations with the enemy, his vassals and subjects. These included an appeal to all subjects to harm the enemy and his subjects, the prohibition of trade and navigation, the seizure of all enemy property – public and private – within one's own territory, the arrest or expulsion of enemy subjects, the revocation of all passports, the issuing of general reprisals or letters of marque against all enemy property found inside and outside one's own territory.⁶¹ Whereas before, in the Middle Ages, warfare did not disrupt all peaceful relations between the belligerents and their subjects, now it did. In the Late Middle Ages, wars could be considered as a string of separate acts of hostility. In Early-Modern Europe, war was considered as a state of

⁶⁰ On the Military Revolution(s): Jeremy Black, *A Military Revolution? Military Change and European Society 1550-1800* (London, 1991); idem, *European Warfare 1494-1660* (London and New York, 2002); idem, *European Warfare 1660-1815* (London, 1994); John A. Lynn, *Giant of the Grand Siècle: The French Army, 1610-1715* (Cambridge, 1997); Geoffrey Parker, *The Military Revolution: Military Innovation and the Rise of the West 1500-1800* (Cambridge, 1984); idem, *The Army of Flanders and the Spanish Road 1567-1659* (2nd edn., Cambridge, 1990); David Parrott, *Richelieu's Army: War, Government and Society in France, 1624-1642* (Cambridge, 2001); Michael Roberts, *The Military Revolution, 1560-1660* (Belfast, 1956); Guy Rowlands, *The Dynastic State and the Army under Louis XIV: Royal Service and Private Interest, 1661-1701* (Cambridge, 2002).

⁶¹ See the declarations and manifestos of war of the 17th and early 18th centuries published in Dumont, *Corps universel diplomatique* or in *A General Collection of Treatys, Declarations of War, Manifestos, and other Publick Papers, Relating to Peace and War, Among the Potentates of Europe, from 1648 to the Present Time* (4 vols., London 1710-1732). See Bernd Klesmann, *Bellum solemne: Formen und Funktionen europäischer Kriegserklärungen des 17. Jahrhunderts* (Mainz, 2007); Stephen Neff; 'Peace and Prosperity: Commercial Aspects of Peacemaking', in Lesaffer, (ed.), *Peace Treaties and International Law*, pp. 365-81, at pp. 365-70; idem, *War and the Law of Nations: A General History* (Cambridge, 2005) pp. 102-15.

war, distinct and different from the state of peace. To the state of peace, the laws of peace applied; to the state of war, the laws of war applied and with time, for third States, the laws of neutrality. The Dutch humanist Hugo Grotius (1583-1645) was the first famously to define war as a state (*status*). By the time he wrote this, in 1625, the evolution towards war as a state of affairs was already well under way, as Grotius acknowledged.⁶²

The most elaborate and important treatises in the field of the law of nations of the 16th century dealt with the laws of war and peace(making). The subject also formed the hardcore of Grotius's more comprehensive treatise on the law of nations – as the title made clear – and of most treatises of the 17th and 18th centuries. In his *De jure belli libri tres*, the jurist Gentili had treated systematically in three books with what he considered the three main parts of the *jus belli ac pacis*. In modern terms, these were the *jus ad bellum* – the law on the conditions under which one could wage war –, the *jus in bello* – the laws of war properly speaking, applying to the state of war –, and the *jus post bellum* – the rules about the ending of war and the restoration of the laws of peace.⁶³ Whereas few later authors would treat with this three subjects so systematically and balance as Gentili had, this threefold division became classic and remains so until today.

The just war doctrine, which has been moulded into its classical form by the theologians, canon lawyers and civil lawyers of the Late Middle Ages, still played a crucial role in the writings on the *jus ad bellum* between 1500 and 1800. Under the just war doctrine, war was perceived of as an instrument of justice. It was the forcible self-help of a wronged party against the perpetrator of a prior injury (*executio juris*). Under the just war doctrine, war was discriminatory. Only one

⁶² 'Sed usus obtinuit ut non actio, sed status eo nomine indicetur, ita ut sit Bellum status per vim certantium quae tales sunt: quae generalitas omnia illa bellorum genera comprehendit': Hugo Grotius, *De jure belli ac pacis libri tres* (Paris, 1625), 1.1.2.1: 'But Custom had so prevailed, that not the Act of Hostility, but the State and Situation of the Contending Parties, now goes by the Name; so that War is the State or Situation of those (considered in that Respect) who dispute by Force of Arms'. Translation by John Morrice (1738) of the French edition by Jean Barbeyrac, reprinted as Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck (Natural Law and Enlightenment Classics, 3 vols., Indianapolis, 2005). Also 3.21.1.1.

⁶³ On Gentili, Diego Panizza, *Alberico Gentili, giurista ideologo nell'Inghilterra Elisabettiana* (Padova, 1981); G.H.J. van der Molen, *Alberico Gentili and the Development of International Law: His Life and Times* (Amsterdam, 1937).

side had a right to wage war; only he could benefit from the *jus in bello*, and more particularly the *jura belli* (the rights of war), such as the right to loot, conquer or to hold and be held for ransom. At the end of just war came just peace. This peace too was discriminatory. The just belligerent should see the rights for which he had fought vindicated and could seek compensation for the losses and costs from the war, even inflict a punishment.⁶⁴

The demise of papal and ecclesiastical authority in the field of war and peace and the rise of the sovereign State made the discriminatory character of war an untenable proposition. In the absence of a clear common body of law against which to weigh the opposing claims of princes and of a neutral superior authority to judge on these claims, it became impossible to decide with any semblance of objectivity who represented the just side in a war.

The writers of the law of nations of the 16th century wrestled with the problem of the uncertainty of the justice of a war and tried to adapt the just war doctrine by compromising on the discriminate application of the *jura belli*. For this, two different approaches were tried. There was the approach of the Roman lawyers, such as Ayala and Gentili. They focused on the legal effects rather than on the justice of war by saying that it sufficed for a war to be legal, and thus the laws of war to apply, if the belligerent was sovereign and the war had been formally declared. This did not mean that they pushed the just war doctrine aside, but only that they neutralised its effects on the *jus in bello* and the *just post bellum*. Gentili held that, because it was most often impossible to know who was in the right, it had to be accepted that both sides had a right to wage war. As such, the laws of war needed to be applied indiscriminately to both sides and the peace agreement could not be based on a judgment on the justice of the cause of the belligerents, but on the outcome of the war itself. To him, war was an instrument to solve a dispute in the absence of the possibility to render judgment. Gentili also accepted the possibility of a war to be just on

⁶⁴ Jonathan Barnes, 'The Just War', in: Norman Kretzmann et alii (eds.), *The Cambridge History of Later Medieval Philosophy* (Cambridge, 1982) pp. 750-84; Haggemacher, *Grotius et la doctrine de la guerre juste*; Maurice H. Keen, *The Laws of War in the Late Middle Ages* (London, 1965) pp. 63-81; Theodor Meron, *Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages* (Oxford, 1993) pp. 17-63; Neff, *War and the Law of Nations*, pp. 45-82; Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge, 1975).

both sides.⁶⁵ With their concept of 'legal war,' Ayala and Gentili stepped in the footsteps of some of the commentators of Roman law, among whom Bartolus de Sassoferrato (1314-1357). Bartolus had already accepted the indiscriminatory application of the *jura belli* to both sides in a war.⁶⁶ The commentator Raphael Fulgosius (1367-1427) as well as the humanist Alciato had acknowledged that a war could be just on both sides so that all belligerents could benefit indiscriminately from the *jura belli*. In this, Fulgosius had been somewhat more radical than Alciato, who underscored that the cause should not be manifestly unjust and thus implicitly presumed good faith on the parts of the belligerents.⁶⁷

Alciato thereby came close to the solution advanced and preferred by the neo-scholastics. Vitoria and some of his followers introduced a distinction between the objective and subjective justice of the war. Whereas Vitoria clung to the view that a war could, objectively speaking, not be just on both sides, he acknowledged that each side could be excused, on the basis of an invincible error, from believing in good faith that he was waging a just war. Thus Vitoria introduced the 'bellum justum ex utraque parte' (war just on both sides) on the subjective level. Through the application of two concepts from Roman contract law – *bona fides* and *error* – Vitoria opened the door to a non-discriminatory conception of war, in which both sides had a right to wage war and enjoy the benefits of the laws of war.⁶⁸

To Grotius has fallen, again, the merit of making a synthesis between the two doctrines. Grotius used the dichotomy between the natural and voluntary law of nations to solve the problem of the discriminatory character of war under the just war doctrine. The question of the justice of war he relegated to the sphere of natural law of nations; here, the just war doctrine applied and war could only be just on one side. In the sphere of the voluntary law of nations, the

⁶⁵ Ayala, *De jure et officiis bellicis*, 1.2.34; Gentili, *De iure belli*, 1.6.48.

⁶⁶ Bartolus, *Digestum novum in tertium tomum Pandectarum commentaria Secunda super Digesto novo* (Basel, 1562), ad. D. 49.15.24; Haggenmacher, *Grotius et la doctrine de la guerre juste*, pp. 280-1.

⁶⁷ Raphael Fulgosius, *In Pandectas* (Lyon, 1554), ad D. 1.1.5; Andrea Alciato, *Commentarii in Pandectas* (Lyon, 1550), 1.1.5 and *Paradoxorum iuris civilis* 2.21, in *Opera Omnia* (4 vols., (Basel, 1549), iii: 'utraque parte optimo iure belligerari arbitramur' ('we find that it possible to wage war with the best of right on both sides', my transl.); see Haggenmacher, *Grotius et la doctrine de la guerre juste*, 203-12.

⁶⁸ Vitoria, *De jure belli*, 2.4-5.

concern was with the legal effects of war. Here, Grotius introduced the notion of 'legal war', or in his terminology, 'war in due form' (*bellum solemne*). For a war to have legal effects, it only needed to be waged under sovereign authority and needed to be formally declared.⁶⁹ The Grotian solution was adopted by most writers of the law of nations after him until the late 18th century. It still stood at the centre of the *jus ad bellum* of Wolff and Vattel.⁷⁰ Thus, doctrine acknowledged the right of sovereigns to resort to war at will under the positive law of nations, while keeping the ideal and language of justice alive under the natural law of nations.

With this dual approach to the problem of war, doctrine did more than paying lip service to an old idea; it reflected the duplicity that was endemic to early-modern State practice. In practice, as in doctrine, the just war proved very resilient. During the whole Early-Modern Age, and even after, princes and government took great care, when resorting to war, to justify themselves to their officials, military, subjects, and allies and to neutral States. The justice of war was a matter of conscience, but that did not make it unimportant. Formal declarations of war were often substantial texts in which the reasons for war were explained; these, as well as the less formal manifestos of war were widely distributed and sometimes published in several languages. For these justifications, the rudiments of the just war doctrine were used. Most generally, war was justified as an act of defence against an attack, or at least against a serious violation or most likely a series of violations of the rights, and from the 18th century onwards increasingly also the interests, of the State or its allies. The need to justify a war in terms of defensive action was of great practical importance as one of the main sinews of the security network of any State in Early-Modern Europe were its alliance treaties with other States. The vast majority of these alliances were defensive; the ally would only be forced to stand up to his obligation in case his ally could prove a *casus foederis* and was acting in defence.

Often, it was argued why it was necessary to resort to a full and formal war, as opposed to a more limited military action in the sense of what later would be called a 'measure short of

⁶⁹ Grotius, *De jure belli ac pacis*, 1.3.4.1, 3.3.4-5 and 3.3.12-13; Haggemacher, *Grotius et la doctrine de la guerre juste*, pp. 568-612.

⁷⁰ Vattel, *Le droit des gens*, 3.3.24-28 and 39-40; Wolff, *Jus gentium*, 6.617 and 633-635, 7.777-778 and 888.

war.’ The main thrust of early-modern justifications was that war was the last resort after all other had failed and that it was absolutely necessary because of the proven obstinacy of the enemy. Only in the 19th century would doctrine develop more different categories of ‘measures short of war’ such as self-defence, reprisal and intervention, but some of this already existed before. Self-defence, as a natural right, had been known since Roman times. It formed part of early-modern State practice as a limited use of force against a prior attack by the enemy. Furthermore, early-modern practice and doctrine distinguished between the role of belligerent and auxiliary. An auxiliary in war was an ally, who while not a belligerent himself, was not neutral but supported the war effort of its ally, including through the means of subsidies and of lending troops.⁷¹

But whereas the just war doctrine continued to reign supreme for the need of explaining why a State went to war, it had lost all relevance for the way the war was waged or ended. Regardless of their claims to fight a just war – and the enemy therefore an unjust war – with few exceptions belligerents applied the *jus in bello* indiscriminately to all sides in the war. Moreover, in no peace treaty between sovereigns was judgment was rendered on the justice of war or were concessions made on the basis of the justice or injustice of the war. When early-modern princes went to war, they waged a just war; when they were fighting it or ended it, they fought or ended a war in due form.

b) The *jus in bello* and the laws of neutrality

The writers of the classical law of nations perceived of war as a state, and not as a set of separate acts of hostility. War was the state to which the laws of war applied; peace the state to which the laws of peace applied. One of the functions of formal declarations of war and formal peace treaties was to indicate the point at which the state of war began and ended. As war became ever more disruptive, the laws of war needed to become more detailed and elaborate.

⁷¹ Klesmann, *Bellum solemne*; Randall Lesaffer, ‘Defensive Warfare, Prevention and Hegemony. The Justifications for the Franco-Spanish War of 1635’, *Journal of the History of International Law*, 8 (2006), pp. 91-123 and 141-179; Neff, *War and the Law of Nations*, pp. 95-158.

The same went for the laws applicable to the relations between belligerents and non-belligerents. Over the 18th and 19th centuries, these would grow into a third category, that of the laws of neutrality. Both the laws of war as those of neutrality consisted of a growing body of customary and treaty rules.

Before going into some aspects of the laws of war and neutrality, a general remark needs to be made. Over the 16th and 17th centuries, the *jus in bello* emancipated itself from a broader category of laws *de bello* that had also included matters of military discipline. In other words, the 'international' laws of war became separated from the 'national' laws and customs of military discipline. Whereas the former pertained to the reciprocal rights and duties of military and subjects from two different States, the latter pertained to the internal organisation of the armed forces of a single sovereign and the discipline enforced upon these by and in the name of the sovereign. This dualism between an internal and an 'international' sphere of law was a consequence of the monopolisation of war and the military by the sovereign State.⁷²

From the late 17th century onwards, central governments and military commands started to promulgate legislation and military codes to impose and enforce a stricter discipline on their armed forces, both on land and sea. This was part of a gradual process of 'nationalisation' of the armed forces, by which foreign mercenary had to make place for armies consisting of own nationals. The – often noble – members of the officer corps continued to feel part of an international warrior elite. Instead of the code of chivalry, which had embodied the laws and customs of war of the Middle Ages, came a new body of laws. This started off as the professional code of a warrior elite of mercenary captains and entrepreneurs, and their soldiers. As armies were brought under State control, agreements about the conduct of war on a particular theatre were increasingly negotiated and made in the name of princes, thus becoming the subject of regular treaties. Also, the laws of war were implemented in national legislation and national military codes.

⁷² Barbara Donagan, 'Codes of Conduct in the English Civil War', *Past and Present*, 118 (1988) pp. 65-95, at pp. 75-6 and 82-4. See also Keen, *The Laws of War*; Meron, *Henry's Wars*; Robert C. Stacey, 'The Age of Chivalry', in Michael Howard, George J. Andreopoulos and Mark R. Shulman (eds.), *The Laws of War: Constraints on Warfare in the Western World* (New Haven and London, 1994) pp. 27-39.

One of the main thrusts in the evolution of the laws and customs of war during the Early-Modern Age were the attempts by governments and military commands to regulate the rights of officers and soldiers to plunder as well as to appropriate a share of the profits for the treasury. Under traditional law, the ownership of movables captured during war fell to the individual captor. Under the code of chivalry, this also applied to ransom taken from prisoners of war. As off the 16th century, many peace treaties included stipulations to the effect that prisoners of war would be mutually released. Whereas at first, the treaties still provided for the payment of ransoms already agreed on, over the 17th century, the release became unconditional. Another example of the growing State monopoly over war was the levying of contributions. These were tributes, in money or goods, to be paid to occupying forces which were fixed in written compacts or treaties and which were considered substitute for the right to plunder. These allowed appropriating the profits of war for the army's upkeep or the prince's treasury.⁷³

Siege warfare was a central feature of early-modern warfare. Under the traditional laws of war, a town or fortress taken by storm could be sacked and plundered. The beleaguered lost the right of capitulation once the enemy artillery had been raided. Over the 17th century, this rule was relaxed and it now became customary to allow surrender until a breach was made and the artillery of the besiegers had approached within a hundred yards of the breach. From the other side, surrendering a town or fortress too quickly could give rise to prosecution of the garrison commander for treason by his own command or government. In any case, the vast majority of sieges were ended with a formal capitulation. In many cases, generous conditions were granted to the defeated garrison and the citizens. Mostly, the garrison was allowed to depart with their lives. Often they were granted the right to leave with all honours of war, carrying their weapons and enough food, and sometimes they were even allowed to take deserters along. But, of course, conditions could be harsher and sometimes towns were sacked. From the early 18th century onwards, in an increasing number of cases, separate capitulations were made with the

⁷³ Philippe Contamine, 'Un contrôle étatique croissant. Les usages de guerre du XIVe au XVIIIe siècle : rançons et butins', in Philippe Contamine (ed.), *Guerre et concurrence entre les Etats européens du XIVe au XVIIIe siècle* (Paris, 1998) pp.199-236; Geoffrey Parker, 'Early Modern Europe', in Howard, Andreopoulos and Shulman, *Laws of War*, pp. 40-58.

commanders of the defeated garrison for their soldiers and the town government for its citizens. Under these agreements, the citizens would be guaranteed their lives, property and liberties.⁷⁴

The disruption of the enemy's maritime trade became one of the main features of economic warfare during the Early-Modern Age. During war, but also during times of peace, government licensed private entrepreneurs as privateers to capture enemy merchants and disrupt the maritime trade of the enemy as much as possible. The legal origins of privateering lay in the medieval institution of particular reprisal, by which an individual was granted by his sovereign the permission to seek compensation for an injury suffered from a foreigner by appropriating the goods of a compatriot of the foreigner. Under civilian doctrine, reprisal could only be obtained after one had unsuccessfully sought redress through normal judiciary procedures.⁷⁵ Early-modern peace treaties often stipulated that no reprisals would be granted for the future, except in case of manifest denial of justice. Out of these particular reprisals grew the custom of granting general reprisals. This entailed an appeal to one's own subject to inflict as much harm to the enemy as possible. General reprisals could already be promulgated during peacetime, e.g. in the run-up to a war. General reprisals were granted through 'lettres of marque and reprisal' to certain entrepreneurs to equip privateers and harass the enemy's maritime trade. As States navies grew, men-of-war began to play an ever increasing role in maritime prize taking. Consequently, governments developed rules about the distribution of prizes among the government, officers and sailors.

The laws of maritime warfare tied in with the laws of neutrality. An international body of customary law developed about the mutual rights of belligerents and non-belligerents in relation to 'neutral' shipping; that is the merchants of non-belligerent States. The issue fell subject to a lively and ongoing debate about four main questions. First, there was the question what constituted contraband. Which goods could not be transported to a belligerent because they

⁷⁴ Randall Lesaffer, 'Siege Warfare in the Early Modern Age: a Study on the Customary Laws of War', in Amanda Perreau-Saussine and James B. Murphy (eds.), *The Nature of Customary Law: Legal, Historical and Philosophical Perspectives* (Cambridge, 2007) pp.176-202; John Wright, 'Sieges and Customs of War at the Opening of the Eighteenth Century', *American Historical Review*, 39 (1934) pp. 629-44.

⁷⁵ Bartolus of Sassoferrato, *Tractatus represaliarum* (1354).

were a direct aid to the war effort and could thus be stopped regardless of the nationality of the owner of the goods or of the ship they were transported in? Second, there was the question of what constituted a blockade, preventing all shipping movements. Should this be the effective, permanent blockade of a harbour, or did a more distant blockade by cruising a coastline suffice? Third, there was the question of the status of neutral goods on enemy ships or of enemy goods on neutral ships. Could these be taken as prize? Fourth, there was the question how far the rights of belligerents to stop and search neutral ships reached. These questions would give rise to severe conflicts over the late 17th and 18th centuries, even leading up to war. The Anglo-Dutch Wars of the late 17th century (1652-1654, 1665-1667, 1672-1674) and the Armed Neutrality (1780) stand out.

The position of non-belligerents also underwent a more conceptual change over the 17th and 18th centuries. Under the discriminatory concept of just war, it was illogical for a non-belligerent to be truly impartial as he fell under the moral duty to support the just belligerent. Although there would remain a middle-category between belligerent and neutral, that of auxiliary, the shift to a formal concept of war made room for strict impartiality. The traditional laws of war did not generally provide for specific rights and duties of non-belligerents; these had to be agreed on in particular agreements with the belligerents or enforced from a position of strength. Some 18th-century writers, among whom Bynkershoek, Vattel and Martin Hübner (1723-1795), caught the wind of time and articulated a doctrine of the rights and duties of neutrals, implying a duty of strict impartiality and a right to see their interests, territory, trade and property protected.⁷⁶ In reality, the position of neutrals remained the subject of particular treaty regulations. It would take to the last decades of the 18th century and the first of the following century for general rules of customary law to grow out of this practice.⁷⁷

⁷⁶ Cornelius van Bynkershoek, *Quaestionum juris publici libri duo* (1737, ed. and transl. J. de Louter and Renney Frank, *The Classics of International Law*, 2 vols., Oxford and London 1930); Martin Hübner, *De la saisie des bâtiments neutres; ou, Le droit qu'ont les nations belligérantes d'arrêter les navires des peuples amis*, 2 vols., The Hague 1759.

⁷⁷ John B. Hattendorf, 'Maritime Conflict', in Howards, Andreopoulos and Shulman, *Laws of War*, pp. 98-115; Phil Jessup and Francis Deak (eds.), *Neutrality: Its History, Economy and Laws* (4 vols., New York, 1935-7); Carl

c) The *jus post bellum*

Under a consequential application of the just war doctrine, a just war needed to end in a just peace. Wolff and Vattel spelled out the multiple, far reaching consequences thereof. First, it meant that the unjust belligerent lost his claim to the object for which the war was fought. Second, he was liable for all the damages and costs suffered by the just belligerent because of the war. Third, also the just belligerent was liable for his unjust wartime actions, that are actions that went in against the necessary laws of war.⁷⁸

To Wolff and Vattel, the justice of peace, like the justice of war, pertained to the necessary law of nations, and were thus only operative *in foro interno*. As, *in foro externo*, claims to justice were to be considered irrelevant to the conduct of the war, logically, they were also irrelevant when making peace. The non-existence of an impartial authority to render judgment over the justice of the war – both in terms of *jus ad bellum* and *jus in bello* – made it undesirable as well as impossible to construe peace as an act of justice. It could only be a political compromise, an agreement between equal partners the validity of which did not lie in its justice, but in their consent. Under the voluntary laws of nations, the *jus post bellum* could no but take into account the very basic assumptions that underlay war ‘in due form’: that, in terms of its external effect, it was to be considered ‘just’ on both sides; that both parties had the same rights; and that the voluntary law of nations granted impunity to the unjust side.⁷⁹ Both just war as well as war in due form had their complement: just peace and compromise peace, which one could also call formal peace.

J. Kulsrud, *Maritime Neutrality to 1780: A History of the Main Principles Governing Neutrality and Belligerency to 1780* (Boston, 1936); Stephen C. Neff, *The Rights and Duties of Neutrals: A General History* (Manchester, 2000); C.G. Roelofsten, *Studies in the History of International Law: Practice and Doctrine in Particular with Regard to the Law of Naval Warfare in the Low Countries from circa 1450 until the Early 17th Century* (Utrecht, 1991).

⁷⁸ Vattel, *Le droit des gens*, 4.2.18; Wolff, *Jus gentium*, 8.986.

⁷⁹ Vattel, *Le droit des gens*, 3.12.190-192.

With this, Wolff and Vattel, as other has done before them, capitulated before the realities of the sovereign States system. The basis for the legal solution to a war was not its justice, but its outcome. According to Gentili, this could either be determined by the victor of the war – in case of a complete victory over the enemy – or by consent in a peace treaty. The vast majority of wars in Early-Modern Europe ended in compromise peace along the lines of what Vattel understood under it. This was different for many peace treaties made between European States and indigenous people outside Europe. In the East Indies as well as in the Americas, the European powers often styled peace treaties as unilateral grants of peace. The treaties laid the blame for the war, which was labelled a rebellion, at the doorstep of the indigenous peoples. Amnesty was a unilateral act of mercy, which had to be paid for through cessions and tributes.⁸⁰

None of the peace treaties between European sovereigns of the Early-Modern Age rendered judgment on the war and contained an attribution of guilt to one of the belligerents. In the preambles of peace treaties, the signatories most often limited themselves to deploring the war and the hardship it had brought in the most general of terms. The refusal to judge was not restricted to the level of the *jus ad bellum*, but also extended to the *jus in bello*. From the 16th century onwards, it became customary for the signatories to include a clause of amnesty in the treaty. This implied that the signatories waived all claims for damages and costs because of the war, for themselves as well as for their subjects and adherents. By the beginning of the 19th century, these clauses disappeared but by then it had been long since accepted that they were automatically implied.⁸¹ The amnesty clause tied in with another common stipulation from early-modern peace treaties, that relating to the restitution of private property. During the Early-Modern Age, it was customary for the belligerents to seize and confiscate the property of enemy subjects found on their territory. Under the doctrine of war, this was done to safeguard the future payment of the damages and the costs of war caused by the unjust enemy belligerent. As peace treaties did not render judgment on the justice of war, it was impossible to consider these seized goods as compensation for damages and costs, so that the legal basis for their seizure collapsed.

⁸⁰Jörg Fisch, *Krieg und Frieden im Friedensvertrag. Eine universalgeschichtliche Studie über Grundlagen und Formelemente des Friedenschlusses* (Stuttgart, 1979) pp. 139-204.

⁸¹ Grotius, *De jure belli ac pacis*, 3.20.15; Vattel, *Le droit des gens*, 4.2.20; Wolff, *Jus gentium*, 8.990

Therefore, logically, most peace treaties included a general clause of automatic restitution. To this general standards provision, treaties also made a standard exception, namely for all movables. There were sound reasons to do so. First, under traditional law, captured movables went to the capturer, and not to the State – although this rule has lost much of its practical application by the early 18th century. Second, the retrieving and restitutions of movables would be far more complex than that of immovables and would cause a multitude of disputes and court cases that would make a speedy solution to the war impossible. These two general clauses were often supplemented with dozens of more detailed stipulations.

Between 1500 and 1800, peace treaties became increasingly extensive, growing into documents containing dozens, and with time hundreds of often detailed political and legal stipulations. In general, one can distinguish three categories of peace treaty clauses. First, there were the political concessions made and won by the belligerents. Second, there were the clauses aimed at ending the state of war and dealing with its consequences. Third, there were the clauses aimed at restoring the state of peace and regulating the future, peaceful relations between the signatories. This last category also included provisions for guaranteeing that the peace would be enduring and stable. As war became an ever more encompassing state of affairs and the normal peaceful relations between the belligerents were thoroughly disrupted, an increasing number of matters needed to be dealt with to end the state of war and restore the state of peace. Over the Early-Modern Age, an extensive body of law regarding peacemaking was developed in peace treaty practice. With regards the end of the state of war, peace treaties generally stipulated an end to the hostilities, a general amnesty, the revocation of reprisals and letters of marque, restitution of all seized realty without, however, income from that property lapsed during the time of their seizure, the revocation of all sentences rendered against absent enemy subjects, the conditions under which to restore territories, cities and fortresses and their future legal status, the suspension of prescription before the courts for the duration of the war, the mutual release of prisoners of war and the inclusion of allies and adherents in the peace. With regards to the restoration of peaceful relations for the future, the treaties stipulated perpetual peace and friendship among the principals and their subjects, free movement of persons, the right to trade, the promise for equal treatment of one another's subjects before the

courts, the promise not to grant new reprisals or letters of marque, the protection of enemy subjects and property at the inception of a new war and, finally, the recognition that an infringement by a subject would not break the peace but only lead to sanctioning the perpetrator himself.⁸² From the late 15th century onwards, peace treaties provided for an increasing number of stipulations with relation to trade and navigation. By the 18th century, it had become customary to deal with matters of trade and navigation in separate treaties which were made together with or shortly after peace was made, the so-called Treaties of Friendship, Commerce and Navigation.⁸³

A final word needs to be said about the perpetual character of peace treaties. In early-modern treaties, the signatories normally stipulated that the peace would be 'perpetual.' As such, a peace treaty differed from a truce that was only made for a limited period of time. The perpetuity of peace was, however, qualified. It did not imply that the signatories promised never to resort to war against one another again. It only meant that the peace treaty exhausted their right to resort to war for the disputes over which the war had started – or which had later during the war been added as an additional cause – and which had been settled by the peace treaty. A signatory thus only broke the peace if he resorted to war, or the use of force in general, over the same dispute, but not if he resorted to war for another cause alien to the treaty. A truce only suspended the right to wage war and reserved the rights of States to take up arms again over the same dispute once the stipulated period had passed.⁸⁴

⁸² Lesaffer, 'Peace Treaties from Lodi to Westphalia', pp. 29-42; idem, 'Gentili's *iust post bellum*'.

⁸³ Stephen C. Neff, 'Commercial Aspects'.

⁸⁴ Belli, *De re militari et bello tractatus*, 5.2.3. and 10.2.27-28 and 35; Gentili, *De jure belli*, 2.12.302-305, 3.14.590 and 3.24.708-711; Grotius, *De jure belli ac pacis*, 3.20.27 and 3.21.5; Pufendorf, *De jure naturae et gentium*, 8.7.6; Vattel, *Le droit des gens*, 4.2.19; Wolff, *Jus gentium*, 8.987; Fisch, *Krieg und Frieden*, pp. 355-361.

4. *The sovereign State and its representatives*⁸⁵

Early-modern diplomatic practice was marked by the rise of standing diplomacy. The use of permanent residents first originated in Italy in the 15th century. Before diplomats had only been used on temporary assignments. During the Middle Ages, some rulers held *procuratores* on a more permanent basis in Rome with the papal courts. These were lawyers especially assigned to represent their rulers in cases pending before the papal courts. The rise of standing diplomats was a by-product of the attempts by the leading powers of Italy to stabilise peace and form long-standing alliances among one another, particularly after a 25-years peace was made at Lodi (1454). From Italy, the practice slowly spread over Europe during the 16th, 17th and 18th centuries, to become a common practice. This did not exclude the use of temporary diplomats on particular assignments, such as treaty negotiations or the participation in peace conferences.

Standing diplomacy put different demands on the laws of diplomacy, in particular in relation to diplomatic immunity. Diplomatic immunity is almost as old as diplomacy itself. The works of the early-modern writers on the law of diplomacy such as those of Gentili and Grotius abound with examples of its violation or upholding from biblical or ancient Greek and Roman times. Already in Antiquity, it was generally acknowledged that the physical integrity of foreign representatives should be respected and protected. The canon and civil lawyers of the Late Middle Ages developed a jurisprudence of diplomacy and diplomatic immunity. The Roman private law contract 'mandate' (*mandatum*) formed the doctrinal basis under the laws of diplomacy. Furthermore, diplomats were not only considered to be the promoters of their principal's interest, but also promoters of the common good of the whole Latin West. This made diplomats more vulnerable from attacks from their hosts. Therefore, and also in view of the limited extension and duration of their mandate, diplomatic immunity was restricted to what was necessary for the exercise of the assignment. Diplomats were therefore liable for actions which

⁸⁵ E.A. Addair, *The Extraterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries* (New York, 1929); Myres S. Anderson, *The Rise of Modern Diplomacy 1450-1919* (London and New York, 1993); Lucien Bély, *Espions et ambassadeurs au temps de Louis XIV* (Paris, 1990); Garrett Mattingly, *Renaissance Diplomacy* (Boston, 1955).

fell outside their mandate. They could thus be prosecuted for common crimes and for the payment of their debts.

Over the Early-Modern Age, immunity became more absolute and extensive. For this, two main causes can be indicated. First, the collapse of the *respublica Christiana* and the rise of sovereign State ended the duplicity inherent to the doctrine of medieval diplomacy. The diplomat now received the unequivocal acknowledgment that he was the representative and promotor of this ruler's interest and nothing but that. This gave ammunition to the doctrine that only that ruler could judge on the diplomat. Second, the more permanent presence of diplomats extended the reach of their activities and made their liability for common legal disputes ever more problematic. The problems of standing diplomacy were exacerbated by the Reformation as questions about the right of diplomats to practice their religion in a country adhering to another confession arose. Early-modern practice is ripe with examples of political and legal disputes on the extension of diplomatic immunity.

Gentili was one of the first modern writers to delve into the subject from a legal perspective. He still upheld that diplomats could be prosecuted for common crimes and in civil disputes, but he did away with the idea that they were also the servants of the common good of Christianity. Gentili was, famously, consulted in the case of the Spanish ambassador in England, Bernardino de Mendoza (1541-1604), who was involved in the so-called Throckmorton plot of 1584 to assassinate Queen Elisabeth (1558-1603) and to put Mary, Queen of Scots (1542-1587) on the English throne. Gentili held that the ambassador could not be prosecuted, not because of an immunity but because natural law did not allow the punishment of an attempted crime and because diplomats could not be judged under municipal law, but only under the (natural) law of nations.

It fell to Grotius to bring about a revolution in diplomatic doctrine. The Dutch humanist defended the doctrine of extra-territoriality. In essence, this comes down to the fiction that diplomats do not find themselves on the territory of the host land and thus do not fall under that country's jurisdiction. By consequence, they fall solely under the jurisdiction of their own sovereign. The host can thus only appeal to the diplomat's sovereign to act or is left with the option of expelling the diplomat. In practice, the exact boundaries of the immunity of a diplomat

and his followers varied with time and place and were subject to negotiations and disputes. But in general, in practice as in doctrine, a more absolute and extensive interpretation of immunity arose.

5. *The Expansion of Europe.*⁸⁶

The Early-Modern Age is the age of Western-Europe's first worldwide imperialism. Between the late 15th and the 18th centuries, several Western European States conquered and built overseas empires spanning the globe. The Portuguese, later followed by the English, French and Dutch, built a maritime and commercial empire in the Eastern Indies with trading and staging posts along the coasts of Africa. The Spanish destroyed and took over the great empires of the Aztecs, Mayas and Incas in Mexico and Peru and formed settler colonies there. The Portuguese and more temporarily the Dutch did the same with Brazil as did several other European nations, mainly the Spanish, French and English, in Northern America and the Caribbean.

Colonisation and empire-building raised the question of the justification of conquest and occupation by the European powers, both in relation to the people and rulers overseas as in relation to European competitors. The first European empire-builders, the Spanish and Portuguese, were quick to claim a monopoly on navigation, trade and colonisation outside

⁸⁶ Anghie, *Imperialism*; Joshua Castellino and Steve Allen, *Title to Territory in International Law: A Temporal Analysis* (Aldershot, 2003); Jörg Fisch, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (Stuttgart, 1984); Lewis Hanke, *The Spanish Struggle for Justice in the Conquest of America* (Dallas, 2002); Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge, 2002); Randall Lesaffer, 'Argument from Roman Law in Current International Law; Occupation and Acquisitive Prescription', *European Journal of International Law*, 16 (2005) pp. 25-58; Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500 – c. 1800* (New Haven and London, 1995); ; Karl-Heinz Ziegler, 'Völkerrechtliche Aspekte der Eroberung Lateinamerikas', *Zeitschrift für Neuere Rechtsgeschichte*, 23 (2001) pp. 1-29.

Europe and the Mediterranean and to base their claims on papal investiture. In his bull, *Dum diversas* of 1452, Pope Nicholas V (1447-1455) granted the Portuguese king the right to explore and conquer all heathen lands. The bull *Romanus Pontifex* (1455) defined the geographical extends of this grant more precisely but also made it exclusive to the Portuguese. After Christopher Columbus (1492-1506) made his first voyage to America in 1492-1493, Pope Alexander VI (1492-1503) promulgated the bull *Inter Caetera* (1493) by which the Spanish kings were invested with exclusive rights to the lands and seas 100 miles west of the Azores and the Cape Verde Islands, thus dividing the world between the two Iberian powers. With the Treaty of Tordesillas (1494), both powers agreed to fix the line 270 miles more to the west. After the first circumvention of the world (1519-1522), the need arose to fix a second line through the Pacific, which was done at the Treaty of Saragossa (1529).⁸⁷

The Portuguese discovery of a trade route to the Indies around Africa (1495) and the Spanish discovery of America (1492) were the outcome of their earlier expeditions in the Northern Atlantic and along the Atlantic coast of Africa, which in turn were a next step in the expansionist drive that came from the *Reconquista* of the Iberian peninsula from the Arabs and the Moors and the many overseas contacts, peaceful and not, with Northern Africa. The papal investiture of the Portuguese and Spanish with the right to explore, navigate, rule and exploit the lands and seas to be discovered outside Europe is to be explained from a missionary and crusader's perspective. The Portuguese and Spanish kings were acknowledged to be the Church's defenders and champions in the spreading of the faith. The conquest and submission of lands and peoples and the exploitation of natural resources was held to be necessary because it was instrumental thereto; other European princes had to respect the Spanish and Portuguese kings' monopoly because they were acting for the common cause of Christianity.

The Spanish and Portuguese strategy came quickly under attack, also from inside Spain. Vitoria famously rejected the authority claimed by the pope to grant secular rights over non-Christians – or any other people for that matter. He appealed to natural law and the classical just war doctrine to justify the Spanish conquests in the Americas. Vitoria recognised the empires and

⁸⁷ For these and other related texts: Frances G. Davenport (ed.), *European Treaties bearing on the History of the United States and its Dependencies to 1648* (4 vols., Washington, 1917).

political entities of the natives for being 'perfect communities' or organised, political societies with their own laws. But natural law, which was common to all men, stipulated some rights, such as the right to communicate, to trade and to spread one's faith. The violation of these rights gave just cause for war, the outcome of which could then be the conquest and submission of the unjust enemy.

The doctrines of Vitoria and other representatives of the Spanish School of Salamanca did not greatly impact the practices of their government, but it set natural law centre-stage in the doctrinal debates of the 16th to 18th centuries on the issues of the freedom of navigation and the acquisition of territories outside Europe. From the early 16th century onwards, the Iberian claims to exclusive rights over the oceans and lands outside Europe were challenged by other powers, in particularly France, and later the Republic and England. French jurists argued that the papal grants did not impede upon pre-existing rights of other Christian princes in areas where the Portuguese and Spanish had not effectively ventured first. The Protestant powers rejected all papal claims right away. At the Truce of Vaucelles (1556), the French king conceded that his subjects could not navigate or trade in the Spanish Indies (mainly Spanish America) without permission of the Spanish king. Although a concession by the French, it also left room for the interpretation defended by the French and others that the Iberian exclusive rights were limited to the areas they had effectively under control. In later peace treaties, Spain could not again attain such a concession of France. In peace treaties with France and other powers from the late 16th and the 17th centuries, mutual claims about the Indies were often left unsettled. This did not imply, as some scholars have claimed, that the peace treaty did not apply to the Indies and that a permanent state of war raged there, but only that it contained no settlement of opposing claims.⁸⁸

Grotius and other protestant writers also took inspiration from Vitoria and the Spanish neo-scholastics. Grotius confirmed the existence of natural and thus universal rights of navigation and trade. He turned the argument, however, against the Iberian claims to monopolisation. Grotius, as others before and after him, used the concept of *occupatio* of a *res nullius* from the Roman *jus gentium* to justify the acquisition of land by European colonisers from

⁸⁸ Grewe, *Epochs of International Law*, pp. 152-62; Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (4th edn., Berlin, 1997).

the natives. Just as the first appropriation of a thing that belonged to nobody (*res nullius*) confers title of ownership, so the first occupation of unoccupied land (*terra nullius*) confers title. Crucial to Grotius's doctrine was the claim that uncultivated land was unoccupied. Nomadic people held no title to their lands. Under the same reasoning, in his *Mare Liberum*, Grotius defended the impossibility to vest title over the sea, as it could not be occupied.

The doctrine of occupation would grow into one of the leading doctrines for the justification of European colonisation. It would also be used in practice, mainly in the era of Second Imperialism (19-20th centuries) and in Australia and Africa. But treaties with the local rulers and people became the main instrument of European colonisation. Cession of rights and lands by treaties, except of outright conquest, formed the main legal underpinning of much of the European empire-building from the 15th to the 20th centuries