

HISTORIOGRAPHY OF INTERNATIONAL LAW UP TO 1980

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ABSTRACT

Historiography is primarily concerned with the history of history writing and this includes a critical examination and evaluation of the methods and sources of data of the histories and their makers. International Law, on the other hand, is a youthful discipline with a problem of placement. It is a branch of International Relations which is, itself, a branch of Political Science. But as a branch of law, a problem is created as to whether it is not proper, in looking at the history and historiography of International Law, to do so as part of the larger field of legal history. The pioneer historians and historiographers of the discipline did not do that.

Keywords: *Historiography, fields in history, legal history, municipal law, International Law.*

INTRODUCTION

This article is an attempt to determine what properly constitutes the historiography of international law since the discipline itself is still evolving unlike municipal law. Such a task will be made easier if an attempt is first made to understand the discipline of International Law itself.

There are two parts to the essay. The first part looks briefly at the evolution of the discipline including the reasons which necessitated its appearance while the second part looks at its historiography to determine its true nature. In short, the article is an exercise to meet the founding fathers and pioneer historians of modern Interna-

tional Law. The eight subsections of the essay are definition of field, (Part I), concerns of the field, assumptions of the field, the early works in the field, the historians in the field, their sources of data and the issues in debate in the field (Part II), to be followed by the concluding paragraph.

Part I

Definition of field:

There is a difference between Public International Law or the Law of Nations and Private International Law, otherwise known as The Conflict of Laws. The term modern International Law is almost always a reference to the former and it is defined as a system of law which governs relations between states.

At one time, states were the only bodies which had rights and duties under International Law. But today, international organisations, companies and individuals also, sometimes, have rights and duties under International Law. Nevertheless, it is still true to say that International Law is primarily concerned with states. The discipline itself is said to have begun at about the same time as the emergence of nation-states in the 16th and 17th centuries. According to Professor Jennings it was called into being to regulate the relations of the independent nation-states which emerged from the Renaissance and the Reformation (Jennings, 1960). Another view is that it was called into being in the 16th century to supply the legal basis for Spain's occupation of the New world. The roots of International Law, however, go further back into history. The ancient Greeks for instance, developed arbitration as a pacific settlement, a device which has become important in recent times.

The ancient Greek Stoics also developed the idea of the law of nature which influenced the Roman third group of laws – the *iusnaturalis*. Roman achievement in legal thought was immense and came to be respected throughout the Western world for a long time. The ‘*corpus juris civilis*’ of the Byzantine emperor Justinian (AD 527–565) is testimony to this. With the breakup of the Roman empire, the task of developing international law fell to the Church which over the centuries developed what came to be the ‘*corpus juris canonica*’. In addition to the Pope being the supreme authority in Christendom there was the emperor who represented secular authority. In 800, Pope Leo III conferred the imperial crown upon Charlemagne, thereby restoring what came to be the Holy Roman Empire, a grand monarchy which covered the whole of central Europe. Despite this setback to the development of international law, the Middle Ages made some notable contributions. These were in the areas of the ‘just war’ doctrine and the development of natural law. St. Thomas Aquinas (AD 1225–1274), who wrote extensively on both, came to hold a powerful influ-

ence on the Church especially on the question of natural law. There is no doubt that he influenced the first academic theorists of modern International Law like Francesco Vitoria who was a Spanish Dominican.

Between 1492 and the present, International Law has undergone several changes. At the beginning the field was dominated by academic writers. It was only in the mid-nineteenth century that state behaviour became the main basis of the development of the law. The gradual movement towards the acceptance of arbitration as a pacific settlement between states is traced to the Jay treaties of 1799. However, it was the Alabama Arbitration of 1872 which presented the spectacle of successful state submission to arbitration decisions on the basis of legal rules. This Alabama Arbitration was a forerunner to the permanent Court of Arbitration of 1899 which, in turn, preceded the establishment of the Permanent Court of International Justice (PCIJ) (Jennings, 1960).

When the United Nations was created in 1945, it had as one of its six principal organs, the International Court of Justice (ICJ). This came to replace the PCIJ. In addition, the United Nations General Assembly created the International Law Commission (ILC) with the task of drafting rules where customary law is non-existent or insufficiently developed. Beginning from 1958, the ILC organised a series of codifications of some of the customary laws. Four conventions on the law of the sea were signed in Geneva in 1958; a convention on consular relations and immunities was signed at Vienna in 1963 and a convention on the law of treaties was signed, again at Vienna, in 1969. The obvious advantage in codifying international law, as Michael Akehurst has pointed out, is that the rules become more precise and more accessible and new states are more willing to accept rules which they themselves have helped to draft (Akehurst, 1980). This trend has been, indeed, very healthy for the evolution of international law because as Professor Jennings once noted, ‘...there can be no true

rule of law in international or in any other society unless it is possible for a party to a dispute to get to a court to find what the law is in relation to the dispute ... (Jennings, 1960).

The ILC codification exercises thus present International Law with one source of precise rules and regulations to guide the conduct of nations and, thereby, help arrest the glaring absence of a legislature for this system of law unlike the municipal systems. Other sources for this system of law are listed in article (38) section (1) of the statutes of the ICJ. These are international conventions, international custom, general principles of law and judicial decisions and teachings of the most highly qualified publicists of the various nations. In the context, "convention" means treaty while "highly qualified publicists" refers to academic writers. On the issue of judicial decisions, the PCIJ and ICJ together have built up, over the years, an impressive number of cases which have become the precedents for controlling the activities of states.

Areas covered by modern International Law include treatment of aliens, acquisition of territory, state succession, disputes between states, treaties, law of the sea, airspace and outer space, international wars as well as civil wars. In all these areas, International Law has made impressive achievements since the early days of the academic writers of the 16th century. For instance, on treatment of aliens it is now an accepted rule that all states will extend to aliens the minimum treatment they are willing to extend to their own citizens. This is not to suggest that a state that denies basic human rights to its own citizens is free to behave the same way to aliens. Normally, it is expected that the standard which obtains in the alien's country should be taken into account in his treatment. Such a rule has made it possible for people to move freely around the world without any inhibitions. But poor states are, sometimes, badly affected when they have to cater for aliens beyond their means. On acquisition of territory, the United Nations has recognised the existing boundaries of states. This means that a whole range of primitive

methods of gaining title to territory are no longer acceptable. Plunder, conquest and even occupation are no longer valid means of acquiring territory. It is generally recognised among civilized people that there is no more terra nullius. On the question of state succession, provided the seceding state has the attributes of a state and proves stronger than the parent state, it has all the legal basis for forming a separate state. This is a point Quebec, for instance, was very conscious of in its quest to become a separate state from Canada. And Marcel Chaput argued that case out well in his book, *Why I am a Separatist* (Chaput, 1972). Quebec remains part of Canada because the latter proved stronger and was unwilling to permit separation. Again apart from the codification of the law of the sea noted above, three sections of the sea are recognised. These are the territorial sea, the contiguous/economic zone and the high seas. Although there is no conclusive agreement on the last, the general tendency is to reserve it as common heritage of mankind.

The territorial sea is, however, accepted by all states as part of the coastal state. But there are problems with the economic zone since some states are not satisfied as mere custodians of the 200 mile zone, they want complete jurisdiction. Concerning international and civil wars, it is worthwhile to note the gains of International Law with respect to the treatment of prisoners of war, the humanity question and the avoidance of barbaric behaviours. First, it is a rule that no war can be waged unless it has been declared. On the humanity question, the Swiss, Dunant, needs to be mentioned. His eyewitness account of the carnage at Solferino and his subsequent agitations led to the creation of the Red Cross which now has legal access to the wounded in any wars. The problem of recognition of states comes into the picture on the issue of civil wars and this is also one major area of International Law.

Part II

Concerns of the field:

The history of International Law is concerned with the attempt to understand the evolution of

the international system of law. Historians of this law accept that international law exists and has a long history which stretches into antiquity. For instance, any time independent political communities have come into peaceful contact with one another, they have always felt the need for some sort of international law to govern their relation: that treaties should be obeyed and that envoys should not be violated. This reality takes the historian of international law further back into the past to study the doings of societies which have contributed to the modern law. This backward sweep of the historian of international law makes his concerns similar to the historian of political thought and political philosophy. Infact, originally the field was largely political history. And it was the task of these historians to investigate notions like “*ius gentium*” and “*ius naturale*” in order to determine how Roman law played ancestor to the modern law. In the Middle Ages, theology dominated the search for the law of nations. Therefore, it was also the task of these set of historians to explain why and establish the actual contribution of the Church to the modern law.

Another point worth noting at this stage is that the modern law we have today is largely an European creation. But in the past there were competing international laws. Initially, the Europeans were prepared to accept that non-European states had at least limited rights under the European system of international law and vice-versa. By 1800, however, the Europeans had conquered most of the world and absorbed the non-European states into their culture. On the attainment of independence, these countries have not sought to re-establish non-European system of international law. Instead, they have accepted it and tried to obtain revision of individual rules which are contrary to their interests. Thus a large part of the concern of the history of international law, recently, has tended to concentrate on regional studies in an attempt to document the contributions of these regions to modern international law. Such studies have been done for Japan, Latin America and the Koreas,

among others (Jacobini, 1979; Oda and Owada, 1982).

From the middle of the 19th century, the history of international law began to focus attention on the behaviour of states as the basis of the development of the law. The activities of the Permanent Court of International Justice, the International Court of Justice and other bodies which deal with International Law are also of concern to the International Law historian. He is interested in international state practices as are indicative of adoption or rejection of legal rules. He is concerned about peace treaties and other conventions in which significant legal conceptions are enunciated. In the process of following the doctrinal development, these sets of historians pay attention not just to the teachings and lives of the great thinkers in the field but also to their fame or oblivion as important factors for evaluation. The International Law historian is interested in exposing for the benefit of all the ramifications involved in and the processes which had to be followed before an international agreement was arrived at by way of a treaty. This way he is able to throw more light on the legal questions by placing them in the proper social, psychological, political and philosophical contexts.

Some assumptions of the field:

One assumption concerns the nature of the international system itself: that International Law will be obeyed by the states. International Law was called into being to regulate the actions of independent sovereign states. But sovereignty and international law are not synonymous and it has been the task for both jurists and historians to resolve the problem. Both groups have succeeded in this task by getting the parties to appreciate that there is, in reality, no conflict between sovereignty and international law, ultimately, since it is possible to obey international law without surrendering sovereignty. The absence of a legislature was taken by the critics as a possible weakness which could torpedo the system. But this absence has turned out rather to

be an advantage since states, invariably make the laws for themselves. And therefore, they make laws they would not be tempted to break because as Brierly has pointed out, the yoke of violation lies too easily on the states themselves. And that the ultimate explanation of the binding force of all law (municipal and international) is that the reasonable man believes that order instead of chaos is the governing principle of the world in which he has to live (Brierly, 1963).

Another assumption of the early writers concerns the sources of the principle for the law. One set of such writers, while disagreeing about many things, all agreed that the basic principles of law were derived not from any deliberate human decision but from principles of justice which could be discovered by pure reason. These basic principles were called natural law and their adherents became the naturalists and included Grotius, Vitoria, Suarez, Gentili and Zouche. Initially, natural law was thought to be a divine ruling but Grotius wrote that international law would still have existed if God had not existed because the existence of natural law was the automatic consequence of the fact that men lived together in society and were capable of appreciating certain rules as necessary for the preservation of society (Akehurst, 1980). The logical conclusion of natural law, however, was that an unjust rule could not be law. Obviously this was absurd for any system of law and in the 18th century critics of natural law began to argue that law was largely positive, that is, man-made. These positivists distinguished between law and justice and one exponent of this group was Cornelius van Bynkershoek. An attempt to combine naturalism with positivism was made by Vattel, a Swiss writer. He emphasised the inherent rights which states derived from natural law but said they were accountable only to their own consciences for the observance of the duties imposed by natural law unless they had expressly agreed to treat those duties as positive law (Akehurst, 1980).

Early works in the field:

The first historiography of state practice in Inter-

national Law came out in the second part of the 19th century, in 1851, when Francois Laurent published his Histoire du droit des gens et des relations internationales. However, the first historiographer of modern international law is said to be von Kaltenborn because the point of departure for his work was Gentili, one of the academic writers. His book, Kritik de Volkerrechts was published in 1847. In it, he undertakes a penetrating and erudite criticism of the various doctrines on modern International Law and his work is regarded as a worthwhile contribution to the study of the history of International Law. Otherwise, the first known work in the history of International Law appeared in 1785 with the publication of von Ompteda's Literatur des.. Volkerrechts, a book dismissed as more of a bibliography than a historical account. In 1795, Robert Ward published his Inquiry in the Foundation and History of the Law of Nations in Europe from the Greeks and Romans to the Age of Grotius. Ward's fault in this book was his denial of the existence of a universal law of nations. Otherwise, his book, as the title suggests was the first major inquiry into political events relative to International Law with emphasis on the Middle Ages. The first study, however, which involved both political events and the doctrine of international law was undertaken in the 19th century in 1841 by Henry Wheaton. It was in French but the title translates in English as History of the Law of Nations in Europe and America since the Peace of Westphalia. The book is largely compilatory with little original thought, especially, with respect to the section on doctrine where quotations are relied upon. Forty years after the publication of von Kaltenborn's work, Rivier, a Latin-Swiss and a professor at the University of Brussels, wrote the Literarhistorische Uebersicht de systems und Theorem des Volkerrechts as the first volume of Franz von Holtzendorf's Handbook of the Law of Nations. Ernest Nys, a student and friend of Francois Laurent also wrote much on the history of International Law.

In 1899, an English historian, Thomas Walker

wrote the History of the Law of Nations which was described as a scholarly work on the subject. In 1928, another work by two authors, Butler and Macoby, was published under the title The Development of International Law but it was pure political history. In 1936, Wegner published his Geschichte des Völkerrechts, a work also described as dominated by political rather than doctrinal history. Arthur Nussbawn dismisses Wegner's work as retrogressive in as much as he interpreted the history of International Law as revolving around Prussia. Professor Redslob of the University of Strassbourg also published one work on the history of International Law in 1923 (Nussbawn, 1954).

Other 20th century works on the subject include C. van Vollenhollen's The Three Stages in the Evolution of the Law of Nations (1919) and the Law of Peace (1936); Anzilotti's Lehrbuch des Völkerrechts (1929); Joseph Kohler's Grundlagen des Völkerrechts (1918) and Jackson Brown Scott's The Spanish Origin of International Law (1934).

In 1954, Arthur Nussbawn published the Concise History of the Law of Nations. This book is easily one of the best textbooks of the discipline. The author wrote the book after several years of teaching the subject. As a result, the coverage is very extensive and the criticism is very intense. He does not only do political history, he traces the doctrinal development of the law as well. He has two appendices, one on the survey of the history of international law and another which is a refutation of James Brown Scott's thesis that the Spanish are the founding fathers of modern International Law. One other specialised study worth noting is Hersch Lauterpacht's Development of International Law by the International Court (1958).

The historians of the field:

A close scrutiny of the field of the history of International Law reveals one fact which is that the majority of these early writers of the history were people without any training in historiography. Those listed above were mostly professors

of law such as Redslob, Laurent, Nys and Rivier; or jurists of one type or another such as Hersch Lauterpacht, James Brown Scott and Jackson Ralston. Arthur Nussbawn was a professor of law but he taught the history of International Law for a long time before writing about it. Of the list, it is only Thomas Walker who was a professional historian.

The above statement, however, is not to suggest that the history which these people wrote is less important or of poorer quality. Van Vollenhollen's work which takes off from the time of Gentili (1552-1608) is a critical analysis of the writings on modern International Law. Von Kaltenborn was a positivist and his approach was philosophical. His penetrating and erudite criticism of the doctrines of the law thus makes his contributions to its history very useful. His method contrasts sharply with Robert Ward's, for instance. In the case of the latter, aside from some minimal analysis of medieval treaties and a couple of scattered observations, the book consists mainly of a stupendous and diffuse compilation of historical data. There is a lengthy theoretical introduction and the emphasis, despite the title of the book, is on the Middle Ages (Nussbawn, 1945). The cut off point for Henry Wheaton's work is 1648, that is, the Peace of Westphalia. His book thus extends over the whole course of history, is mainly narrative and compilatory with little criticism on the doctrine of the law. However, the book proved of value as reference for diplomats and students at the time of publication because of the style and the amount of information provided. Otherwise, this is one of the works which is largely political history. Other works in this category include those by Thomas Walker and Butler and Macoby.

Francois Laurent, who was professor at the University of Ghent, wrote copiously on both civil and international law. By 1870, he had produced eighteen volumes altogether of his Histoire du droit ... Writing at the time of Belgian independence, his book was concerned more with the moral and religious phases of political history in

its international aspect. The dominating theme in his writings was that the Church was a participant in the law of nations. As far as the Middle Ages were concerned, Laurent argued that the supremacy of the papacy was necessary for the moral education of the people. But in modern times, he advocates for a vindication of state rights against the demands of the Church.

Another Belgian, Ernest Nys, who was a University professor and an appellate judge in Brussels, is credited as the first historiographer of International Law who devoted all his time to the study of the history of International Law. Nys wrote much. Apart from Les origines du droit internationales, he wrote Etudes de droit internationales et le droit politique (2 volumes), "Les Etats Unis et les droit des gens" in Revue de droit internationales et de legislation comparee and Le droit des gens et les anciens jurisconsultes espagnol. In addition, he also wrote an excellent introduction on Francisco Vitoria in the Classics of International Law. In all these, Ernest Nys, wrote as a historian with little judicial analysis. It is said that the historical introductions of his Le droit internationale (3 volumes) of 1912, constitute the best available source of summary historical information on the history of International Law.

Sources of data:

On the issue of sources and assessment of sources, this is one area where the historians of international law have been efficient. Throughout this research, it was only in one case that the criticism of inadequate documentation came up and it was in connection with Histoire des grands principes du droit des gens depuis l'antiquite' jusqu'a la veille dela grande guerre (1923) by Professor Redslob. He had tried, according to Nussbawn, to write the history of International Law by subordinating all the historical facts under four headings, namely, binding force of treaties, freedom of states, equality of states and solidarity of states. Nussbawn did not find the whole project convincing in any way. There is also the problem of Francois Laurent who wrote too rapidly and too many

volumes. Between 1851 and 1887 when he died, he produced 18 volumes of Histoire du droit ..., Avant projet de revision du code civil, and 4 volumes on a Cours elementaire du droit civile and a number of monographs (Nussbawn, 1945). However, Laurent has to be excused because of the period in which he lived. This was the time when Belgian politics was characterised by a struggle between the liberals and the Catholics. He was a liberal and, without going into actual politics, he fought against clericalism and intolerance in his books.

Apart from the criticism against Redslob and Laurent, the general criticism one comes across in a survey of the historiography of the field is that the writers devoted too much attention to sources rather than to history. Von Ompteda's work comes under this category. Rivier's work is also described as primarily bibliographical and biographical. Nussbawn also criticises Henry Wheaton for using too many quotations in his work instead of the criticism of the doctrines. The same accusation is levelled against Thomas Walker who is said to have overloaded his book with extensive excerpts.

Issues in debate in the field:

Some of the major issues in the field have already been referred to above. These problems have come about because the law, as well as its history, are still in the process of evolving. There is, for instance, the problem of sovereignty of states and the jurisdiction of the courts. This is a fundamental problem and a basic challenge of the discipline. The moment it is resolved, International Law would have matured. It is unimaginable, though, to think of that eventuality without some minimal form of world government. On the question of newly independent states, most of them have been forced into an alien culture. There are, however, attempts to introduce various ideas from the developing countries to enrich the European heritage which has come to stay. A third issue of debate is about the real founding fathers of international law.

We have already noted above that James Brown Scott believed that the Spaniards were the true developers of modern International Law and that Francesco Vitoria should be regarded as the father of modern International Law. His thesis was refuted by Arthur Nussbawn (Nussbawn, 1945 pp 296-306). The doctrinal controversy between the naturalists and the positivists is also not quite over. But it would not be long before the two schools of thought would come to accept that their positions complement one another. This is exemplified by the aspirations of the present crop of naturalist writings led by Hersch Lauterpacht and the neo-positivists led by Hans Kelsen.

CONCLUSION

Major changes have taken place in the field of the history of International Law since the days of von Ompteda. Emphasis has shifted away from tracing the origins of International Law (Robert Ward, Henry Wheaton) through the attempt to define what International Law is - Thomas Walker actually tried to distinguish between "normal" and "abnormal" law - to a concentration on the examination of the activities of states as the basis of International Law. More attention is now focused on the work of the international courts and other international bodies. Lauterpacht's work on the international court is an example of a possible approach to the study of the history of International Law. The period is specific, the theme is well-defined. While there is an exposition of judicial decisions, examination of legal rules, emphasis of the impact of some states on the system, the whole book is a historical account of the development of the law by the two international courts, the PCIJ and ICJ.

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APPENDIX 1

English translations of works in German in the Text

Von Ompteda, D.H.L. (1785). *Literatur des Volkerrechts* (Literature on International Law).

Gentili, A. (1847). *Kritik des Volkerrecht* (A critique of the Law of Nations).

Rivier, A. (1887). *Literarhistorische Uebersicht der System und Theorem des Volkerrechts* (A General Historical Overview of the System and Theory of International Law).

Kohler, J. (1918). *Grundlagen des Volkerrechts* (The Fundamentals of International Law).

Anzilotti, D. (1929). *Lehrbuch des Volkerrechts* (Textbook on International Law).

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