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In the Embrace of France

An Introduction[1]

On 27 and 28 April 2006 an international conference was held at Tilburg University on the international legal and constitutional position of the French satellite states during the Revolutionary and Napoleonic Eras (1789–1815). The three conference conveners are all members of the Tilburg Research Group on the History of International Law, itself a part of the Tilburg Law Faculty's Research Centre for Transboundary Legal Development. The direct occasion for this conference was the bicentenary of one of these French satellites, the Kingdom of Holland, and of the accession to the throne of that Kingdom by Napoleon's younger brother, Louis, in June 1806.[2]

Nevertheless, the focus at the conference was not solely on the Kingdom of Holland. The main purpose of the conveners was for the conference to contribute to the scholarly debate on the legal structure of Revolutionary and Napoleonic Europe, through the study of the position of France's satellite states under the law of nations, and the reflection thereof in their constitutional law and government structure. These questions should not be addressed in isolation from the political and diplomatic reality with which the law interacted. Therefore, several diplomatic and political historians were invited to present a paper.

If the history of international law has – until the 'boom' of the last two decades –[3] been one of the least developed fields of legal history, the Revolutionary and, even more, the Napoleonic Ages, are among the most neglected of periods. Self-standing studies on the law of nations of that period are extremely

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[1] Many thanks to Raymond Kubben for his useful comments and suggestions.

[2] The Tilburg colloquium was not the only legal historical endeavour to commemorate this important moment in Dutch history. Professor Jan Hallebeek of the Free University of Amsterdam and Professor Boudewijn Sirks, formerly of the J. W. Goethe University in Frankfurt-am-Main and now Regius Professor of Civil Law at Oxford, convened a conference on the legal and administrative history of the Kingdom of Holland at Amsterdam. The enactments of this conference have already been published: J. Hallebeek and A. J. B. Sirks (eds.), *Nederland in Franse schaduw. Recht en bestuur in het Koninkrijk Holland (1806–1810)* (Hilversum 2006).

[3] Ingo Hueck, The Discipline of the History of International Law, in: *Journal of the History of International Law*, 3 (2001), pp. 194–217; 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/Boston 2006), pp. 27–41.

scarce, or, even until recently, almost non-existent.[4] The swiftest glance through even recent surveys of the history of international law – both monographs written by genuine historians of international law as well as short historical introductions to international law textbooks – confirms this. This is even true for French authors.[5]

The relative absence of the Revolutionary and Napoleonic Ages in the great surveys of the history of public international law is not hard to explain. The Revolutionary ideas and the changes, which they brought, are hard to fit into the traditional understanding of international law's history common among international lawyers and legal historians. This understanding is based on two central ideas. First, the period from the seventeenth to nineteenth century saw the rise and articulation of a law of nations based on an almost absolute notion of state sovereignty. This evolution reached its high mark in the nineteenth century. Second, the twentieth century, beginning with the Peace Treaty of Versailles and the Covenant of the League of Nations (1919/1920) brought revolutionary change towards the decline of state sovereignty. This leads to a contraposition of Westphalian, classical law of nations and post-Westphalian, modern international law. International Relations theorists also speak of these periods in terms of 'Hobbesian' on the one hand and 'Grotian,' if not 'Kantian,' on the other.[6]

The main fundament under this *communis opinio* is the self-perception of the international lawyer of the twentieth century as a kind of revolutionary. It serves

[4] For older work, see J. Basdevant, *La Révolution française et le Droit de la Guerre continentale* (Paris 1928); M. Dufraisse, *Histoire du Droit de Guerre de 1789 à 1815* (Paris 1867); François Laurent, *Histoire du droit des gens et des relations internationales* (Paris 1867–1869), vol. 13 and 15; B. Mirkine-Guetzevitch, L'influence de la Révolution française sur le développement du droit international de l'Europe orientale, in: *Recueil des Cours de l'Académie de Droit International* (1928), vol. 2, pp. 299–457; Ernest Nys, La Révolution française et le droit international, in: Ernest Nys, *Etudes de Droit International et de Droit Politique* (Brussels/Paris 1896), pp. 318–406; Robert Redslob, Völkerrechtliche Ideen der französischen Revolution, in: *Festgabe für Otto Mayer* (Aalen 1974), pp. 273–301. For more recent work see: Marc Belissa, *Fraternité universelle et intérêt national (1713–1795). Les cosmopolitiques du droit des gens* (Paris 1994); idem, *Repenser l'ordre européen (1795–1802). De la société des rois aux droits des nations* (Paris 2006) and references there. See also *La révolution et droit international* (Paris 1990).

[5] Many historical surveys do not even devote a distinct chapter or paragraph to the period but move from the Early-Modern Age, often 1648–1815, to the Vienna Congress with but a few cursory remarks on the Revolutionary and Napoleonic Ages and their contribution to the further development of international law: Carlo Focarelli, *Lezione di Storia del Diritto Internazionale* (Perugia 2002), pp. 87–88; Dominique Gaurier, *Histoire du droit international. Auteurs, doctrines et développement de l'Antiquité à l'aube de la période contemporaine* (Paris 2005); Slim Laghmani, *Histoire du droit des gens du* jus gentium *impérial au* jus publicum europaeum (Paris 2003), pp. 130–132; Henri Legohérel, *Histoire du droit international public* (Que sais-je 3090, Paris 1996); Karl-Heinz Ziegler, *Völkerrechtsgeschichte. Ein Studienbuch* (2nd ed., München 2007). Wilhelm Grewe devotes 12 pages to the period: Wilhelm Grewe, *The Epochs of International Law* (Berlin/New York 2000), pp. 413–424.

[6] See on this traditional reading of international law's history, and for relevant literature, Randall Lesaffer, The Grotian Tradition Revisited: Continuity and change in the history of international law, in: *British Yearbook of International Law* 73 (2002), pp. 103–139.

him to extrapolate the differences between the classical law of nations and modern international law and to put the spotlight on the revolutionary contributions of the Covenant (1919) and Charter (1945). Pride of place among the great changes of the twentieth century is reserved for the rise of an institutionalised international community, the re-emergence of the individual in international law through the international protection of human rights and the gradual limitation of state sovereignty, most significantly in relation to the use of force.

The classical law of nations, which some indeed more accurately call modern law of nations, and which preceded Versailles, was based on the principle of almost absolute state sovereignty. While it is by and large considered to have reached its highpoint in the nineteenth century, the common opinion is that it already started to take shape from the second half of the seventeenth century onwards. The publication of Hugo Grotius' *De iure belli ac pacis libri tres* in 1625 and the Peace Treaties of Westphalia (1648) are most commonly referred to as the first embodiments of the classical law of nations. Since James Brown Scott and others reclaimed a place for the sixteenth-century 'precursors' of Grotius, more heed is taken for the earlier traces of the 'Westphalian' system, which go back beyond the Renaissance to the Late Middle Ages.[7]

For a long time, the history of the classical law of nations of the seventeenth to the nineteenth century has consistently been written in terms of the rise of the sovereign state. Everything that paved the way to the highpoint of 'Westphalian' state sovereignty in the nineteenth century is put into the spotlight; everything that nuances, blurs or contradicts the picture is dusted under the carpet as a remnant of the old medieval system or an anomaly. The 'Westphalian' or 'Hobbesian' law of nations can be characterised along the following lines. First, states were the sole subjects of the law of nations. There was a strict dualism between the municipal and the international legal orders. Within that last order, individuals played no direct role but could only have their rights and claims presented through the endeavours of their state. Consequentially, the system was atomistic. Sovereign states were all considered to be equal parties to the international community, regardless of their size or form of government. A logical complement of all this was the doctrine of non-intervention. Second, states were also the sole authors of the law of nations. Legal positivism found its expression in international law in the doctrines of voluntarism and consensualism. These implied that states were only subjected to these laws and obligations they had expressly or tacitly consented to, thus reducing the law of nations to treaties and customary law. The international community as such had no law-

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[7] James Brown Scott, *The Spanish Origin of International Law: Francisco de Vitoria and his law of nations* (Oxford/London 1934); Wolfgang Preiser suggested 1300 as a starting point, Über die Ursprünge des modernen Völkerrechts, in: E. Bruel (ed.), *Internationalrechtliche und staatsrechtliche Abhandlungen. Festschrift für Walter Schätzel zum 70. Geburtstag* (Düsseldorf 1960), pp. 373–387.

making authority. The reduction of international law to the treaties and customs of states left no room for natural law as a source of binding rights and obligations. Third, the states were also the sole enforcers of the law of nations. This, ultimately, gave them an almost unlimited right to wage war. Although this is a radical interpretation of the classical law of nations to the point of caricature, which at no time reflected reality, it is an accurate picture of the basic assumptions, the paradigmatic understanding upon which traditional historiography of international law rests.[8]

In the story of the emergence of the sovereign state and a law of nations based on it, the Revolutionary and Napoleonic period hold a tedious place. Its treatment is ambiguous. But in this, historiography at least respects the complexity of reality. On the one hand, the French Revolution paved the way for the shift from the dynastic state of the *Ancien Régime* to the nation-state of the nineteenth century. The doctrine of national or popular sovereignty with its equation of nation and state and the claim to self-determination of the people, both on the level of their belonging to a state and of the choice of government, underpinned the doctrines of non-intervention and of equality of the states.

On the other hand, Revolutionary and Napoleonic ideals and achievements challenged many of the basic assumptions of the classical law of nations. The doctrines of popular sovereignty and self-determination might serve to strengthen state sovereignty, they could and would also be turned against it. After the radicalisation of the Revolution by the Convention from 1792–1793 on, Revolutionary zeal mobilised these ideas to justify intervention, expansion and, in the end, subjugation to the missionary nation of France.[9] The cosmopolitan and Kantian ideals about peace and the international community as a community of citizens and not of states, was, of course, at odds with the whole framework of the sovereign state system of the *Ancien Régime* and of the nineteenth century. Even if many of the Revolutionaries found in the sovereign nation-state the bulwark of the people's fundamental and inalienable rights, in the longer run these same rights opened the door to interventionism, the rebirth of natural law and spelled doom for the dualism of the classical law of nations. Some authors have stressed the association between the 'missionary interventionism' of the French Revolution and the just war doctrine.[10] These Revolutionary and Napoleonic views and actions in the field of international law collide with the traditional view of the slow but continuous growth of the sovereign state system

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[8] Lesaffer, Grotian Tradition; Stephen Neff, *War and the Law of Nations: A general history* (Cambridge 2005), p. 171.

[9] Antonio Cassese, La diffusion des idées revolutionnaires et l'evolution du droit international, in: *Révolution et droit international* (Paris 1990), p. 299 and references there; idem, *Self-Determination of Peoples: A legal reappraisal* (Cambridge 1995), pp. 11–13.

[10] Grewe, *Epochs*, pp. 416–417 and 422–424; Mirkine-Guetzevitch, Influence de la Révolution, p. 308.

and its international law from the seventeenth century to its heydays of the nineteenth century. The Revolutionary and Napoleonic Age is thus banned as much as possible from great historical syntheses and surveys, or briefly demoted to, in the words of the great German historian of international law, Wilhelm Grewe, 'a particular, transitory stage.'[11] The amount of attention the Vienna Congress receives in these historical surveys may be said to be contrary to the attention the Revolution is granted. It is depicted in terms of the, at least partial, return to the old law of nations and its principles. Though it is recognised that some of the gains of the Revolution were sustained – the nation-state, non-intervention and equality – most were, at least temporarily, lost. Only with the revolution of international law in the twentieth century could the other ideas of the French Revolution surface again and take hold on reality. As such, the Revolution recuperates a place, albeit a small one, in international law's very own 'Whig interpretation of history'.[12] In the end, this does little beyond strengthening the idea of discontinuity between the Revolutionary and Napoleonic Ages on the one hand and what came before and after on the other hand.[13]

No such courtesy is granted the French satellite system. This hierarchical reorganisation of a large part of Europe under the aegis of the leading nation of France is considered a complete break-away with what became before and after. At best, it can be considered to have had its impact felt on European imperialism outside Europe.[14] Grewe is vocal in doing away with it as an anomaly in no more than nine lines.[15]

Over the last two decades, the interest in the history of international law has sharply risen. Recent research on the 'Westphalian' law of nations has led to challenging the traditional views, debunking traditional myths – such as the most famous of all, Westphalia – and drawing a more balanced picture. With relation to historical doctrine, some authors have challenged the dominance of positivism in eighteenth- and nineteenth-century thought.[16] A closer study of the state practice from Early-Modern Europe teaches that the 'Westphalian' law of nations was as much an attempt to limit and organise state sovereignty as to accommodate it. The resilience of the just war doctrine, with its implication for states' freedom to use

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[11] Grewe, *Epochs*, p. 413.

[12] Herbert Butterfield, *The Whig Interpretation of History* (New York/London 1965).

[13] Grewe, *Epochs*, pp. 413–424 is a very good example of this ambiguous approach, as is, in relation to the Vienna Congress, Gaurier, *Histoire du droit international*, pp. 387–399.

[14] Paul W. Schroeder labels the Napoleonic empire a colonial system, *The Transformation of European Politics 1763–1848* (Oxford 1994), pp. 391–395.

[15] Grewe, *Epochs*, p. 413.

[16] Kinji Akashi, *Cornelius van Bynkershoek: His role in the History of International Law* (The Hague/London/Boston 1998); Grewe, *Epochs*, pp. 503–512; Mark W. Janis, *The American Tradition of International Law: Great expectations 1789–1914* (Oxford 2004); Emmanuelle Jouannet, *Emer de Vattel et l'émergence du droit international classique* (Paris 1998); Casper Sylvest, International Law in Nineteenth-Century Britain, in: *British Yearbook of International Law* 2004, 75 (2005), pp. 9–70.

force, is an important example thereof.[17] Others have held that while the European law of nations of the seventeenth to nineteenth centuries might have been based on state sovereignty, the European powers at the same time built a system of colonial and imperial law outside Europe that preconfigured many of the changes and developments of the twentieth century.[18] Finally, and most to the point for the theme of the Tilburg conference, in a recent study on equality in international law, Gerry Simpson has claimed that nineteenth-century international law should rather be understood in terms of a tension between equality and hierarchy – or legalised hegemony as he calls it – than in terms of strict equality. He also pretends that what he has dubbed 'anti-pluralism', the discrimination of states on the basis of their beholding to same basic values, has been an element of the international legal tradition since the Vienna Congress. He refers, more particularly, to the special role and privileges assumed by the great powers in the decision making process of Vienna, their role in the 'Concert of Europe' and the interventionist claims of the members of the Holy Alliance. The only reason why he seeks the origins of hierarchy and anti-pluralism at Vienna is that he has not seriously considered the years before.[19]

The main conclusion from all this is that the 'revolution' of international law of the twentieth century was perhaps less radical than traditional historiography has held. For the historian of international law, the fact that eighteenth- as well as nineteenth-century international law was less one-sidedly 'Westphalian' than is traditionally held, lessens the need to quarantine the Revolutionary and Napoleonic Age. Especially the work of Gerry Simpson on legalised hegemony and anti-pluralism is relevant to our subject. If collective hegemony and anti-pluralism were part of parcel of the system of Vienna, did Europe's experience with hegemony, imperialism and interventionism at the hands of the French Revolutionaries and Napoleon not help pave the way for that system?

The conveners of the Tilburg conference all partake in the current rewriting of the early-modern and nineteenth-century international law. Raymond Kubben is writing a study on the international legal position of the Batavian Republic as a French satellite state. It is against these backgrounds that the idea for this conference emerged. The editors and authors represented in this collection do not aspire at offering a comparative synthesis for the several more satellite states covered here. It is a collection of self-standing in-depth studies of different

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[17] Randall Lesaffer, Defensive Warfare, Prevention and Hegemony: The justifications for the Franco-Spanish War of 1635, in: *Journal of the History of International Law,* 8 (2006), pp. 91–123 and 141–179; Neff, *War and the Law of Nations.* For references on this new trends, see Lesaffer, Grotian Tradition and idem, International Law and its History.

[18] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge 2004); Edward Keene, *Beyond the Anarchical Society. Grotius, Colonialism and Order in World Politics* (Cambridge 2002).

[19] Gerry Simpson, *Great Power and Outlaw States: Unequal sovereigns in the international legal order* (Cambridge 2004).

international legal, constitutional, institutional and political dimensions of Revolutionary and Napoleonic Europe.

As mentioned before, the perspective is a broad one. As far as law is concerned, the scope is not restricted to international law, as matters of constitutional law are taken aboard too. Questioning the legal organisation of the French hegemony forces one to consider the constitutional organisations of the dependent powers. Was it a mere factual hegemony, or was there also a legally established system of interference with the internal government of the satellites?[20] But the papers extend far beyond the borders of the law and include several contributions from a diplomatic or political perspective. Three considerations dictated this option. First, historians of international legal practice and diplomatic historians often use the same sources. The international legal practices of states by and large are to be found in the same official and private papers as their political dealings with one another do. Second, as the history of international law is a young and underdeveloped discipline, it has much to gain from the insights offered by diplomatic and political historians. And third, there is no good reason for the historians of international law to stay outside the debates currently waged among diplomatic and political historians on the continuity between pre-Revolutionary, Revolutionary and post-Revolutionary diplomacy and international relations.

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[20] Adam Watson, *The Evolution of International Society: A comparative historical analysis* (London / New York 1992), pp. 15–16, distinguishes three systems of control that extend beyond factual hegemony: suzerainty, dominion and empire, properly speaking. Empire implies direct administration; dominion interference with the internal government of the dependent powers.