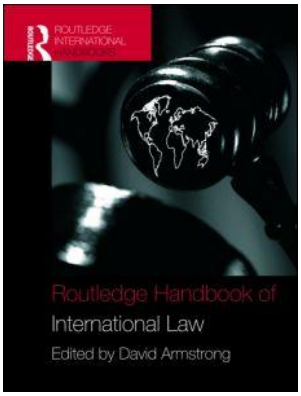

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The Age of Grotius

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The age of Grotius

Edward Keene

This chapter is organised around two themes. First, it examines the changing discourse of international legal thought during the sixteenth, seventeenth and eighteenth centuries. After a brief summary of the traditional narrative of the emergence of Grotian doctrines within the context of the "Westphalian system", particular attention is paid to the ways in which more recent scholarship has opened up new chronological, geographical and philosophical perspectives on the transition from medieval to modern doctrines. The second theme concerns the comparatively neglected issue of the evolution of the international legal profession. Changes in legal education are discussed here, especially the impact of new humanist approaches and the growing focus on training in national institutes of law rather than the medieval ius commune. In this context, the chapter also discusses the professional roles that lawyers played in aspects of the conduct of international relations such as diplomacy. The changing requirements of the latter help to explain the emergence of a new genre of legal scholarship devoted to the historical analysis of treaties, which profoundly influenced the development of positivist doctrines towards the end of the eighteenth century.

The purpose of this chapter is to describe how international law changed during the sixteenth, seventeenth and eighteenth centuries. It is concerned with two related questions: How did the conceptual and doctrinal apparatus of the law of nations, linked to fields such as civil law, canon law, natural law, and public law, evolve during the period? And how did expert practitioners of the law of nations apply these doctrines in the course of activities such as the adjudication of disputes, diplomacy and treaty making? The former question has traditionally occupied the bulk of the attention of legal historians, especially in the English-speaking world. Over the last 150 years or so (Wheaton 1845 is one of the first sustained treatments), a very large, and still growing, literature has accumulated on the changes and continuities in international legal thought from the late medieval civilians and canonists, such as Bartolus of Sassoferrato or Pope Innocent IV; through the sixteenth-century scholastics, such as Francisco de Vitoria; and the later theories of natural law that were influenced by the "new learning" of the humanist movement as well as the Spanish scholastic tradition, advanced by northern European scholars such as Hugo Grotius; to the positivist systems of European public law produced by eighteenth-century authorities such as Georg Friedrich von Martens. By contrast, although the historical development of the practice of international law has by no

means been entirely neglected (Durchhardt 2004; Grewe 2000; Lesaffer 2004; and Roelofsen 1989 are a few recent examples), the literature here is comparatively slight.

There are two reasons for this discrepancy. In the first place, it reflects a wider tendency in historical scholarship to focus on the evolution of disciplinary systems of thought rather than the activities of practitioners. As William J. Bouwsma remarked, we have plenty of "histories of law – indeed great classics on this formidable subject – but very little on lawyers as a profession characterized by a certain social role and a particular perspective on life and the world" (Bouwsma 1973: 304). That complaint is now over 30 years old: Bouwsma acknowledged that it was already beginning to be addressed when he wrote (for instance, Martines 1968), and it has since to a considerable degree been answered by more recent scholarship (Brundage 2004; Karpik 1999; Prest 1981, 1986). Nevertheless, most of these studies have dealt with the evolution of national professions, perhaps because they have a much tighter and more readily identifiable structure, and have touched only marginally on the education, careers and other characteristics of practitioners who concentrated on handling international disputes.

The second reason is that there is a tendency in the study of international law, and international relations more generally, to think of the historian's primary task in terms of illuminating the legal, political and moral principles that played some kind of role – often poorly defined as to exactly how – in shaping the normative structure of the international system or international society at large: the so-called "Westphalian system". The focus, in other words, is on the *structure* of the "international legal order" rather than the *agents* who made that order a reality by consistently applying legal rules to the everyday conduct of relations between princes and states. Where agents do make an appearance, it is often only in the form of a handful of almost heroically great jurists – Grotius is the obvious example – who wrote the authoritative treatises that are said to have laid down the foundations of the international legal order that underpinned the Westphalian system. But that leaves unclear the transmission mechanism through which their doctrines were capable of influencing international affairs. To know how books affect the way people live, one cannot just read the books; one must also understand the readers. In this case, that means understanding the dispositions of trained legal practitioners involved in international affairs, without whom Grotius would have had many fewer readers, rulers would have lacked a vital source of expert assistance with which to conduct their relations with one another and the Westphalian system would quite possibly have ceased to function as a normatively regulated order.

None of this is to say that theoretical treatises on the law of nations do not matter. On the contrary, one cannot understand how international law was practised in the early modern period, or how and why its practice was changing, without an appreciation of the doctrines advanced by authorities such as Grotius; apart from anything else, they were an essential part of the education of practitioners and were commonly referred to in concrete disputes. But just as one cannot understand the practice without the theory, so it is difficult to understand the theory in isolation from the practice. With a few exceptions – Christian von Wolff, for example, who spent his entire career as a professor of mathematics and philosophy at the universities of Halle and Marburg (and whose work was, perhaps not coincidentally, notorious for its abstractness and impenetrability) – most of the people who wrote prominent works on the theory of the law of nations were also themselves practitioners. Grotius, Pufendorf, Emerich de Vattel and Martens all served as diplomats at some point in their careers, although not always with distinction. Many managed to build impressive professional careers in addition to their scholarly accomplishments: Cornelis van

Bynkershoek, for example, wrote his celebrated doctrinal treatises on the law of the sea, rights of ambassadors and public international law while serving as the President of the Supreme Court of Holland, Zeeland and West Friesland (see Ittersum 2006 on Grotius' professional activities and their importance for understanding his scholarship; see Akashi 1998 for a similar perspective on Bynkershoek). That is to say, they had received the kind of training that was common for law students at the time; where available they often possessed appropriate credentials or memberships of professional groups; and they engaged in practical activities such as representing and advising clients or serving on diplomatic missions. One of the contexts within which their texts may be read – although not the only context within which they can be read – is therefore how these occupational characteristics of practitioners of international law were being reshaped during the late medieval and early modern periods.

We will begin by trying to sketch in broad outline the changing conceptual and doctrinal apparatus of the early modern law of nations. We will not look in detail at the works of individual authors (Nussbaum 1947 is still a very useful study in that respect, as is Grewe 2000) and, because there is such an extensive literature on this topic, the discussion is to a large degree a survey of existing work, with a particular focus on points of current controversy and debate. We will start by briefly describing what might be called the standard or textbook account of the origins of modern international law that was originally constructed by nineteenth-century legal historians, such as Henry Wheaton. Their account places Grotius at the centre of the story and depicts his work as a response to the fragmentation of Christendom into a system of independent sovereign states. We will then look at some of the major lines of criticism of this interpretive scheme that have developed over the last 70 or so years, concentrating on questions about the chronological, geographical and philosophical contexts within which the evolution of modern international law may be understood.

In the second part of the chapter, we will turn to the issue of how international law was practised, and especially how the community, if we may use that possibly exaggerated term, of practitioners of the law of nations changed during the early modern period with respect to how its members were trained and the kinds of activities in which they were typically engaged. There are two main points to the argument here. First, legal education, including the teaching of the law of nations, underwent a transformation during the sixteenth and seventeenth centuries that is only partially explained by the process of state formation that occupies such a central place in the standard history of the origins of the modern international legal order. The emergence of sovereign states certainly was important here, but so were educational reforms introduced by religious reformers and (especially) humanists, which reshaped the curricula of law schools and patterns of student mobility, and help us to understand some of the driving forces behind the doctrinal innovations of the seventeenth century. Second, how qualified experts on the law of nations practised their profession also changed. One reason was the restructuring of the system of courts in Europe as states sought to control and rationalise their national jurisdictions, but we will concentrate more on the changing nature of European diplomacy during the seventeenth and eighteenth centuries, and in particular the tendency to recruit diplomats not from the legal profession but from the nobility and the military. Some training in international law was still generally regarded as necessary for a diplomat, but rather than formal legal qualifications, still less a doctorate in law, candidates were increasingly expected to have a grasp of the history of treaties: during the early eighteenth century a number of collections of treaties were published to serve this need, which provided

a crucial part of the background against which positivist theories of international law developed.

The changing discourse of the early modern law of nations

Compare a famous text from near the beginning of our period, Vitoria's *De Indis* and *De Iure Belli* (originally delivered as lectures in the 1530s, and first published in 1557: see Vitoria 1917), with an equally celebrated one from near the end, Martens' *Precis du Droit des Gens Moderne de l'Europe* (first published in 1788: for the first English edition, see Martens 1795). They are different in numerous ways: in the philosophy with which they approach the study of international law, in the method according to which they determine the content of international legal rules, in the sources they use, in the political environment and audience towards which their arguments are addressed, and in numerous smaller, but by no means trivial, linguistic, conceptual and stylistic details. Vitoria saw the study of the law of nations primarily as a branch of the study of natural law, thereby associating his enquiry with a glorious and lengthy tradition of scholarship; Martens dispensed with natural law in a few paragraphs of deliberately faint praise, and described his positivist approach as a "science" that had been shamefully neglected in the past. When Vitoria drew on concrete examples, his major point of reference was the ancient world; Martens asserted that the world had changed so much that it was virtually worthless to study the ancients, and that in most cases one did not have to go back more than 100 or 150 years to know what the law of nations was. Where Vitoria appealed to faith and reason, understood through the lenses of scripture, theology, classical (mainly Aristotelian) philosophy and canon or civil law, Martens looked to treaty and custom, drawing on genres of scholarship that barely existed, if at all, in Vitoria's time: studies of the constitutional law of the various European states, statistical surveys of the European political system, works on modern history, and collections of treaties.

Why did these changes happen? For well over 100 years, the most popular answer to that question has been that it was a response to the transformation of the European political system, above all, the decline of the confessional and imperial unity of Christendom and the consequent fragmentation of western Europe into a system of independent, mutually recognising but also mutually hostile, sovereign states, divided by religious and political differences. Add into the mixture the influence of the more aggressive, competitive form of statecraft proposed by theorists of "reason of state", and one is left with a recipe for what the nineteenth-century international lawyer Thomas Lawrence described as a "tendency to utter lawlessness in international affairs" in the late sixteenth and seventeenth centuries (Lawrence 1885: 173). War on an unprecedented scale, and of an unimagined brutality, was the result. In order to keep the notion of an effective law of nations alive, jurists were forced, so the argument goes, to rethink their ideas about the sources of international legal obligation, moving in the process from a theory of natural law as a code inherent in the order of things and ordained by god, to a voluntarist or positivist doctrine that made the consent of states into the key principle for the establishment of legal rules. International law was thus cut adrift from its high purpose of promoting universal moral principles and was converted into a mere tool in the hands of statesmen; but at least it survived as a real constraint on what those statesmen thought they could legitimately do in the pursuit of their interests. The frequent but limited wars of the eighteenth century are commonly proposed as evidence of both the pliability and the strength of the early modern international legal order in the years before it was transformed yet again by the new forces unleashed by the French Revolution.

To look at this story a little more closely, it really contains two distinct movements. The

first is the initial response to the collapse of the old order, which might be described as a reformulation, rather than abandonment, of the classical doctrine that the *ius gentium* was intimately linked to, and derived much of its force from, a law of nature, *ius naturale*. One of the cardinal themes in the standard history of the origins of modern international law is thus the elaboration of new conceptions of the law of nature, often relocated within a pre-Christian Stoic, or neo-Stoic, context of reason and passions (on neo-Stoicism in general, see Oestreich 1982): it is, in other words, a law of nature grounded in an idea of human nature rather than a divinely ordained, and so ultimately supra-human, code. This reconceptualisation of the natural law of nations in turn passes through several moments: from Grotius' assertion of a basic human instinct for sociability; through Pufendorf's adaptation of the bleaker Hobbesian picture of the state of nature; to Wolff's and Vattel's defence of the possibility of a rationally grounded, Enlightened law of nature based on principles of freedom and equality, the rights of man transfigured into the rights of states.

The second movement is away from natural law altogether, in the direction of a positivist jurisprudence standing alone as the foundation of the law of nations: a law made by the will of properly constituted sovereign authorities. The problem here lay not so much with the medieval theologians but with the Romans who, it is often argued (see, for example, Lawrence 1885), had confused the issue by muddling together *ius gentium* and *ius naturale* as two facets of a rational universal code, whereas, on the contrary, *ius gentium* was really only ever a special set of positive rules developed by the Romans for the resolution of disputes between foreigners (Kelly 1992: 61–62). Grotius again plays a pivotal role in this part of the story, because he was said to have admitted an unusually important role (by the standards of the sixteenth and early seventeenth centuries) to volitional law as a source of the law of nations, alongside his arguments derived from a new way of thinking about natural law. Grotius was often described by nineteenth and early twentieth-century legal historians as an "eclectic" (for example Hershey 1912), occupying a position in between either pure naturalism (for which Pufendorf is the standard seventeenth-century exemplar) or pure positivism (Richard Zouche and Bynkershoek are the principal examples here), and drawing freely on elements of both. This fits well with the traditional idea of Grotius as the pivotal thinker in the emergence of the modern law of nations, since it presents him as a kind of bridge from the dominant naturalism of the sixteenth century to the increasingly positivist outlook of the eighteenth, Wolff and Vattel excepted. Gradually, the argument continues, the naturalist elements of the Grotian system were jettisoned, allowing yet freer play to its volitional or positivist dimension; scholars such as Martens can then be seen as having developed this potential within Grotian thought to its logical conclusion. (Although it might be noted that Martens himself does not describe either his own project or its relationship to Grotius' work in precisely these terms, a point to which I will return at the end of the chapter.)

The standard interpretation thus locates the origins of modern international legal thought firmly in the context of the "Westphalian system" of sovereign states, and points to the neat, albeit not quite perfect, synchronicity between the publication of *De Jure Belli ac Pacis* in 1625 (see Grotius 1925) – the founding text of modern international legal doctrine – and the Peace of Westphalia in 1648 – the founding act of the modern international system. As such, it is still regularly endorsed by textbooks today (for example, Cassese 2001: 19–21). Nevertheless, few legal historians would accept it without reservations, and at least three major critical themes have developed in twentieth-century scholarship.

The first questions the way in which the conventional story treats the mid-seventeenth century as the decisive turning point in the

history of international legal thought, arguing that some of the most important elements of modern ways of thinking were established well before the publication of *De Jure Belli ac Pacis*. In its early form, this line of argument often turned into a debate about who, if not Grotius, should be seen as the real "father" of modern international law. In the 1930s James Brown Scott championed the claims of Vitoria to that title, on the grounds that he had developed a novel idea of "*ius inter gentes*" – law between nations – as opposed to the traditional notion of a *ius gentium* or law of nations, and thus had anticipated one of the hallmarks of the modern age, namely the idea of a legal code produced by the nations themselves through their mutual intercourse, rather than standing above them as a facet of the universal natural law (Scott 1934). Others have subsequently argued that Scott was mistaken to locate the origins of this way of thinking in the Spanish scholasticism of the early sixteenth century – often doubting whether Vitoria's *ius inter gentes* can do all the work Scott claims for it – and some scholars have pointed even further back to what they claimed were similar conceptions developed by fifteenth-century canon lawyers, such as Paulus Vladimiri, and, earlier still, the thirteenth-century Pope (and expert canonist) Innocent IV (Belch 1965 and Muldoon 1972: the latter goes well beyond a focus on Innocent IV alone, and is by no means a naive attempt to identify the "father" of modern international law, something one cannot so easily say for Belch, who often appears to be motivated as much by nationalistic pride in Vladimiri as by other concerns).

Since then, the debate about the chronological origins of modern international law has broadened out to embrace numerous other aspects of the ways in which late medieval legal thought, civilian as well as canonist, played an important role in shaping modern ideas (Berman 1983 is an important study of this theme in legal history in general; see also Post 1964). Its influence has been detected in the origins of vital elements of the modern international legal order such as the concept of sovereignty (Pennington 1993) and the principle of *pacta sunt servanda* (Lesaffer 2000). Moreover, rather than simply developing the idea of a *ius inter gentes*, there was a crucial shift in canonist and scholastic thought in the concept of *ius* itself that took jurists away from the idea of *ius* as an objective legal order, and towards the idea of *ius* as a subjective right, again paving the way for the characteristic voluntarism of the modern perspective on the *ius gentium* as a system of the "natural rights" of sovereign states, rather than a divinely ordained "natural law" operating above them and oblivious to their wills (Bauer 2004; Tierney 1997; Tuck 1979). All these arguments, by looking more closely at the specific ideas and terminologies employed by the early modern jurists, point towards the fact that the conceptual framework that made modern international law thinkable was largely created well before the early seventeenth century. The articulation of the basic concepts of the modern law of nations thus anticipated, rather than followed, the key political changes in the structure of the European system that brought Christendom crashing down in the wars of religion; we will not dwell here on the possible implications of this for our understanding of the causal relationship between ideational and material forces in the revolutionary changes that transformed international relations during the period.

A second criticism is that it is a mistake to focus only on developments within European politics, as is implied by the way the textbook story is organised around the emergence of the "Westphalian system" in western Europe. Late medieval and early modern international lawyers were equally interested in the world beyond Europe, and many of their arguments can be seen, and were sometimes explicitly intended, as attempts to justify European colonialism and imperialism overseas. This overlaps with the first line of argument discussed already, since one of the driving forces behind the focus on continuities with late medieval canon law and

scholasticism was a recognition that international questions had been paramount concerns for those scholars as well, so long as one looked beyond the supposedly unified and internally harmonious world of Christendom. For Scott, it was the encounter with the New World and the legal problems raised by the conquest that had led Vitoria to rethink earlier ideas of the law of nations, while subsequent revisions to Scott's argument were similarly informed by the awareness that such encounters had been going on well before 1492, whether with respect to dealings with Muslims in Spain and the Holy Land (Muldoon 1972) or with pagan and recently converted peoples in eastern Europe (Belch 1965).

One of the pathbreaking works in understanding the importance of the extra-European context to modern international legal thought was Charles Alexandrowicz's *Introduction to the History of the Law of Nations in the East Indies*, and his subsequent study of the legal framework for European colonialism in Africa (Alexandrowicz 1967, 1973). Broadly speaking, Alexandrowicz was interested in how international legal doctrines had permitted, or even assisted, the gradual decline of Asian rulers from a position of rough parity with their European counterparts to a much more subordinate role, in some cases to the extent of their being denied international personality altogether. The sixteenth-century natural lawyers, to simplify Alexandrowicz's account somewhat, had adopted a universalist worldview, within which all peoples had equivalent rights; the emerging positivism of the eighteenth and nineteenth centuries tore up the foundations of those natural rights, leaving non-Europeans in a limbo that allowed European states to treat them as virtually non-existent for the purposes of colonial expansion (Lindley 1926 covers similar ground), but I think this kind of argument is often overstated and it is important to acknowledge the significance of treaty making with non-Europeans at least through the end of the eighteenth and into the early nineteenth centuries (Alexandrowicz's work is a very careful treatment of these issues; see also Jones 1982; Keene 2007; Mainville 2001).

Subsequent work in this vein has explored further the various ways in which the encounter with non-European peoples shaped emerging legal ideas about sovereignty and the law of nations, often questioning the rather benign liberal interpretation that earlier historians such as Scott or Alexandrowicz gave to the supposedly universalist spirit of the sixteenth-century law of nations. As Antony Anghie points out, for example, while Vitoria championed the natural rights of Native Americans: "[H]is work could also be read as a particularly insidious justification of their conquest precisely because it is presented in the language of liberality and even equality" (Anghie 2005: 28). Vitoria proclaimed a universal and reciprocal system of rights, but in so doing he legitimated a situation where the practicalities of the Iberian–American encounter ensured that the various parties had different opportunities to exercise those rights, to the considerable disadvantage of the Native Americans (as well as Anghie 2005, see also Green and Dickason 1989; Pagden 1995). Many other early modern jurists, most notably Grotius, were if anything even more complicit in imperial activities, and their accounts of the law of nations, while often substantially different from Vitoria's, betray a similar talent for developing ideas about sovereignty and property rights that were suspiciously useful for the needs of European imperialists and colonisers (Ittersum 2006; Keene 2002; Tully 1992 is an important study of Locke's political thought in this context). We will not explore the implications of this for our view of the morality of modern international law, but merely observe that the conventional belief that the building of the modern international legal order was a project purely concerned with re-establishing peace and stability within western Europe is no longer tenable: modern international lawyers have always had a global outlook; the management of relations between peoples with

radically different religions, cultures and political or economic systems, often through the application of discriminatory standards, has been a longstanding element of the law of nations – or laws of nations – that they constructed.

The final critical theme involves the exploration of the wider intellectual connections between developments in international legal thought and other currents of change in philosophy, whether natural, moral or political. The standard account of the origins of modern international law is not blind to these contexts, but in general it tends to see the works of thinkers such as Grotius as effectively *de novo* responses to the political crisis created by the collapse of Christian unity and the pernicious influence of reason of state: they were responding to new times by thinking up new ideas, and, in the textbook narrative, the latter often appear to have been inspired by nothing other than their functional or practical utility as solutions to the problem of lawlessness created by the failure of medieval institutions.

By contrast, following methodological innovations introduced by discursive or linguistic approaches to the history of ideas (Foucault 1972; Pagden 1989; Pocock 1973; Skinner 2002), international legal thought may be viewed in the context of an evolving discourse or language within which educated persons thought about and acted on political and legal issues more generally. Martti Koskenniemi, for example, invokes Michel Foucault in his interpretation of modern international law's voluntarism as a facet of the larger shift in political and social thought towards ascending and consensual theories of legitimacy within the state (Koskenniemi 1989). Another argument of this nature, this time with roots in Quentin Skinner's adaptations of linguistic philosophy to the history of ideas, has been made by Richard Tuck. Building on his earlier analysis of the evolution of natural rights theories, Tuck has argued that international legal thought was profoundly influenced by the need to respond to sceptical moral philosophies, which had posed a major challenge to theological theories of a divinely ordained universal moral and legal code: the goal was not simply to respond to raison d'état and the contempt for the law that it inspired, but to develop a new, sceptic-proof moral reasoning (Tuck 1987, 1993). More recently, he has highlighted the way in which both humanist and scholastic philosophers were beginning to create an idea of human beings as autonomous agents within an originally pre-social state of nature, a condition for which, Tuck argues, they found a powerful analogue in the emerging world of independent sovereign states (Tuck 1999). As with Koskenniemi, the evolution of the modern law of nations is thus interpreted as a crucial part of the development of modern liberal political and social thought, and the one cannot properly be understood independently of the other. Parallel arguments have been made about connections to other early modern fields of thought and scholarship, for example the relationship between the scientific revolution and legal postivism, which, we might recall, was proudly hailed as a new "science" by its advocates (Berkowitz 2005 attaches a particular emphasis to the importance of Leibniz in this context).

These are mere sketches of some of the major themes and controversies within traditional and contemporary scholarship on the history of modern international legal thought. They show that the chronological, geographical and philosophical contexts of the early modern law of nations all remain issues of real debate beyond the orthodox "Westphalian" version that still dominates most textbook narratives. And that is not even to go into the controversies that surround the interpretation of individual authors: there is a small industry of specialized Grotius scholarship, for example, on which we have hardly touched here. Nevertheless, having given this overview of the changes in international legal doctrine, and indicated some of the principal lines of argument through which historians have sought to explain why

international legal thought developed as it did, we now want to turn to the issue of how the practice of international law was also changing during this period.

The changing practice of the early modern law of nations

Many of the works on the changing discourse of international law mentioned earlier concern themselves, above all, with a handful of especially prominent jurists such as Vitoria and Grotius. But, of course, this is merely the top layer, so to speak, of a much larger group of experts on the law of nations who were involved in applying legal doctrines to specific cases and disputes and thus making a law-governed international society a reality. As we have said, if we are to understand how theoretical treatises such as *De Indis*, *De Jure Belli ac Pacis* or the *Precis du Droit des Gens* influenced the conduct of international affairs, we need to understand this wider community of practitioners of the law of nations: who were they, how were they trained, and what did they actually *do* when they were practising international law?

These are very large questions, for some of which, especially the sociological or prosopographical question about the composition of the international legal profession, more research is needed before we can even begin to canvass possible answers. The point is further complicated by the fact that, during the early modern period at least, practitioners of the law of nations form a much less easily identifiable group than national legal professions. Although England is perhaps an extreme case, due to the strength of its indigenous common law tradition administered through the Inns, the activities of civil and canon lawyers – from whose ranks English practitioners of the law of nations were often drawn (Helmholz 2001: 5) – were much less closely regulated than their common law counterparts. Their principal organising body, Doctors' Commons, "remained essentially an informal association of advocates that did not certify men for legal practice", and, unlike the Inns, it did not undertake an educational role, which was left to the universities, where civil and canon law continued to occupy the bulk of the curriculum (Levack 1981: 113). Moreover, the mere fact that someone was a civilian lawyer or a member of Doctors' Commons does not, of course, mean that he was involved in practising international law, since ecclesiastical disputes provided an alternative, and probably more important, source of work. Thus, while the Inns offer an obvious starting point and valuable repository of information for any survey of the English legal profession in general (as Prest 1986 demonstrates), it is harder to locate equivalent data about the sociological profiles of those English lawyers who had a special interest in the law of nations.

Although it is difficult to make generalisations about the social or personal characteristics of early modern international lawyers, one can say more about the education or training they would typically have received at universities or other specialised academies, and one can also make some observations about the kinds of professional activity in which, having gained their qualifications, they would have engaged. In terms of legal education, the principal theme of the early modern period is the fragmentation of what, by the late middle ages, had become a remarkably standardised curriculum organised around the *ius commune*: a compound of Roman civil law and canon law, the former based on Justinian's *Corpus Iuris Civilis* and the latter on Gratian's collection of papal canons, the *Decretum*; with both having accreted a large literature of glosses and interpretations (Bellomo 1995). From the perspective of international relations, the crucial feature of the *ius commune* was its continental scope: it was a common European discourse, overlying the often very different specific legal codes within countries or cities, which made it possible for lawyers from different countries, and lawyers representing different princes or

foreign nationals in disputes at places such as the papal *curia*, to argue together about the merits of their particular cases, and so hope to achieve some sort of mutually intelligible, if not always mutually acceptable, judicial resolution of their claims. On this basis, numerous courts within Europe, for example courts of chivalry, although organised on a national or local basis, could presume to some kind of international jurisdiction, on the grounds that they were applying a law that was essentially the same for all everywhere (on this aspect of the courts of chivalry, see Keen 1965; something similar may be said for mercantile courts, see Cutler 2003: 108–40).

One of the most important elements that created and sustained the *ius commune* as a European code was the nature of legal education. During the thirteenth and fourteenth centuries a highly internationalised legal profession developed whose members were trained in the same ways, read the same textbooks, and, as a result, practised the law in an essentially similar manner, irrespective of the particular courts or cases in which they were engaged. Bologna, Paris and Oxford were outstanding institutions in this respect, and the first two especially attracted students from across Europe, often organised along national lines within the common university framework and making them virtual "international societies" in their own right (Kibre 1948; see also Cobban 1975). Even the proliferation of law schools across Europe during the thirteenth century did not seriously dent the unity of the profession: so great was the prestige of the first *studia generale*, above all Bologna, that they were able to transmit a standard curriculum and course of study to the newer academies, especially since the latter were eager to establish their prestige and reputation as providing suitable training (Brundage 2004: 26–63; see also García y García 1992). Moreover, because the *ius commune* was essentially the same wherever it was practised, doctors of civil or canon law (or both: *doctores utriusque iuris*) could go almost anywhere in Europe to practise; it is not at all difficult to imagine a German student going to Paris to earn a doctorate in canon law, before pursuing a career at the Roman *curia*, quite possibly in the employ of a prince from yet another country.

The late medieval law curriculum came under attack from two main sources during the sixteenth century. One was the Reformation, which was centred around an assault on the whole apparatus of canon law: Luther's decisive break from the Catholic Church was heralded, we might recall, by his public burning of key canonist texts (Witte 2002). This had important effects on the education of lawyers by inspiring the foundation of new institutes of learning, by encouraging rulers of various confessions to control the teaching provided in "their" universities and by profoundly reshaping patterns of student mobility. Some universities, even relatively new ones, now became vital educational institutions for the members of a particular faith: for example, Leiden (where Grotius studied) "was indisputably the largest international centre for seventeenth-century Protestants . . . between one-third and one-half of all students were foreigners" (Ridder-Symoens 1996: 423). The Reformation (and the Counter-Reformation) thus did not prevent students' international mobility altogether, but they did channel that mobility down certain, confessionally defined routes, undermining the less restricted Europe-wide mobility of the later Middle Ages. In terms of the content of curriculum, however, it is easy to exaggerate the ultimate impact of the Reformation: despite the ferocity of Lutheran attacks on canon law, civil law continued in its importance, and even teaching in canon law persisted at universities in Protestant countries (Helmholz 1992; Witte 2002).

A more significant and lasting change in the curricula of law schools was produced by the other great challenge to traditional legal teaching: humanism. As Donald Kelley has explained, this worked along two main lines (Kelley 1970). The first was the development

of philological studies, which led to a reinterpretation of classical texts, often to the detriment of late medieval scholarship, both canonist and civilian, whose barbarous Latinity became a refrain of advocates of the "new learning". The second, of perhaps greater long-term importance for the development of international law, was historical. In contrast with the *mos italicus* of ahistorical interpretation of texts such as the *Corpus Iuris Civilis* that had been practised at Bologna (and elsewhere), the *mos gallicus* that humanist scholars developed in France demanded that legal texts be understood in terms of their specific historical context and content, and embraced the notion that legal codes developed over time. Combined with princely efforts to exert control over statutory law – which provides considerable support for the traditional focus on the importance of state formation to the development of modern international law – this led to a new emphasis on the evolution of national systems of law, often from their feudal and customary origins. By the seventeenth century, to gloss over a long period of highly fruitful and original legal scholarship, it was beginning to result in the concept, if not yet codification, of institutes of national law as an essential feature of legal training: national institutes were studied in very similar ways across Europe, but the mere fact of their existence at the centre of law schools' curricula lent a new particularism to legal training and professionalisation (Luig 1972). Even Roman law was now subjected to the *usus modernus* and studied according to a comparative method, charting the various ways in which classical principles had evolved in different countries rather than insisting on the Europe-wide unity of the Roman legal heritage (Brockliss 1996: 601). Coupled with the growing importance of national institutes: "It was only a matter of time before jurisconsultants in the common-law dominated regions of northern Europe would declare that the study of civil law was professionally pointless" (Brockliss 1996: 608).

The growth of a more historical and national focus in legal scholarship and education, with the concomitant decline in the relevance of civil law, had obvious implications for the teaching of international law or (to use a slightly looser, but, we believe, more useful formulation) the application of the law to international affairs. Whereas the later Middle Ages had had an internationally shared *ius commune* and a highly internationalised legal profession, by the mid- to later seventeenth century the international scope of both had been significantly reduced. Neither canon nor, *a fortiori*, civil law had entirely lost its relevance or its place on the curriculum of law schools, but the typical law student was now receiving relatively more training in a particular national legal code and he emerged into a profession that, although not completely nationalised, was increasingly becoming so and had patterns of international connections that were dictated by confessional boundaries rather than being European in extent. The *ius gentium* had been an integral part of the *ius commune* and was virtually inescapable by anyone acquiring a legal training; in a world where even the study of civil law could be derided as "professionally pointless", this was less the case.

One response, and an extremely important one in terms of the doctrinal changes of the seventeenth century that we have already discussed, was to institute chairs in natural law and the law of nations. In terms of its academic disciplinary character, it is worth noting that this essentially new subject field was not rooted in the old civilian or cannonist scholarship of the *ius commune* (an obvious place for the study of the *ius gentium*) but was, as Laurence Brockliss puts it, "born fully clothed, so to speak, with the foundation in the mid-seventeenth century of a number of courses in the northern Protestant universities, beginning at Leiden in 1658" and expanding quickly to Lutheran and Calvinist countries (Brockliss 1996: 602–603). Not only does this help us to understand the

relative freedom, intellectually speaking, with which seventeenth-century scholars were able to begin developing elaborate new schemes of natural law and the law of nations, but also one can perhaps understand why, doctrinally speaking, so many of the major authorities on the law of nations in the seventeenth and eighteenth centuries were Dutch or German – Grotius, Pufendorf, Bynkershoek, Wolff, Martens – and why one finds fewer English, French or Spanish authors discussed in conventional histories of international legal thought during that period, despite the relative importance of the last in international affairs.

The significance of these changes in the education of new generations of lawyers can be more fully appreciated if we also look at the kind of professional activities they might have pursued after they had gained their qualifications. As was, and, of course, still is, the case for lawyers in general, international lawyers represented clients in courts and advised them as to the legality of specific courses of action in cases where some aspect of the law of nations applied. Opportunities to practise in this manner continued throughout the early modern period: for example, courts of admiralty consistently threw up disputes between foreign nationals or about issues – such as the taking of prizes – where the law of nations was a crucial element of the process (this was the occasion for one of Grotius' most important early writings on international law, *De Jure Praedae*: see Grotius 1995; see also Ittersum 2006 for an excellent exploration of the concrete legal dispute about the prize in question). Since these were often disputes within what would eventually come to be known as private international law, this perhaps provides a reason why the latter field remained relatively close to the theoretical scholarship of earlier studies of natural and especially Roman law (Savigny 1880).

Nevertheless, some of the most important courts where questions of international law had been argued and judged in the Middle Ages clearly experienced a diminishing influence in the early modern period. The obvious example is the *curia* which had been, among other things, a vital setting for the adjudication of disputes about recognition and for various forms of international arbitration (Grewe 2000). Moreover, since the Church had become increasingly dominated by trained lawyers rather than theologians (see Brundage 2004; Guillemain 1962; Partner 1990), this represented a major way in which the late medieval legal profession, greatly assisted by its internal homogeneity, was at the centre of the management of international affairs. The decline of the papacy as a site of international adjudication and arbitration during the early modern period thus implied a significant restriction on the opportunities for lawyers to play such a pivotal role in dispute adjudication and in diplomatic bargaining more generally.

The decline of the lawyer-dominated papal court's role was paralleled by other changes in early modern diplomacy. In the late Middle Ages, diplomatic missions had, from about the thirteenth century on, increasingly been staffed by counsellors and civil servants, with great hereditary nobles tending to appear in a more or less ceremonial role as the head of a mission; lawyers were especially prominent among the new, bureaucratic type of diplomat (Queller 1967: 152–7). They were not the only source from which the latter were drawn – merchants, for example, might well be employed on a mission with economic concerns – but they were one of the most important: reviewing the list of ambassadors sent to Florence during the fifteenth century, Donald Queller observes that: "The most striking factor . . . is the very large number of lawyers" (Queller 1967: 157). This was reciprocated: "Throughout the thirteenth and early fourteenth centuries, when the need arose, Florence continued to rely on the expert hand of its lawyers in relations with the Empire and with other communes and city-states" (Martines 1968: 312; Ganshof 1971; Mattingly 1955: 116).

One should not understate the importance of ceremonial, which clearly lent significance to the continuing noble element in diplomacy, but the detail of negotiation was increasingly the preserve of professional lawyers.

Numerous changes in diplomacy – such as the rise of the resident ambassador, charged as much with information gathering as with specific negotiations; and the growing humanist emphasis on oratorical and personal or social skills – led to significant changes in the recruitment and training of diplomats. During the seventeenth century, in France and England at least, there was a trend towards the recruitment of diplomats from the military, rather than the legal profession (Roosen 1976: 67; see Black 2001: 44). When questions about the appropriate qualifications for diplomats were raised, the kind of education that was thought useful was quite different from a detailed study of the law, still less the possession of a doctorate. David Horn remarks that, in the English service, "the one technical accomplishment demanded of young men who wished to make a career in diplomacy was a knowledge of French" and he observes that there was a general disdain for university education among serving diplomats, expressed also by key authorities on diplomatic practice such as Abraham de Wicquefort (Horn 1961: 136; but also 134–5). It is perhaps revealing, although we would be wary of overemphasising the point, that detailed studies have found little evidence of serious legal training among either the Dutch or Spanish ambassadors at Munster during the negotiations for the Peace of Westphalia, although the terms of the treaty do show some influence of technical legal concepts from Roman law (Winkel 2004: 234).

During the early eighteenth century there were a number of attempts to provide some specialised training for diplomats, most famously in Torcy's short-lived *Académie Politique*, established in 1712 but which only survived for a few years, and related institutions such as the academy founded at Strasbourg or the Regius professorships in Modern History at Oxford and Cambridge (Keens-Soper 1972). The curricula for these diplomatic academies, as well as emphasising languages and the study of modern European history and statistics, included a legal dimension. Grotius and Pufendorf were both standardly recommended, but a highly significant addition was the insistence that the would-be diplomat should familiarise himself with the history of treaties (and with accounts of negotiations, as well as with public – that is, constitutional – law within the various European states).

The need to study treaties helped fuel demand for a new and influential genre of legal scholarship. One of the key figures at the French Academy, Jean-Yves de Saint-Prest compiled a collection of treaties from French archives for his charges, while an even more ambitious work was put together by Jean Dumont as his *Corps Universel Diplomatique du Droit des Gens* (Dumont 1726). Dumont began his multi-volume work by making an explicit distinction between the "*corps diplomatique*" that he was trying to create and the "*corps du doctrine*" that he attributed to scholars such as Grotius. Anticipating the attitude of Martens' positivist science of public law, Dumont paid lip service to the importance of natural law, but it was very clear that he thought the study of natural law and the law of nations in the manner of the late seventeenth-century German and Dutch universities was less relevant than a familiarity with the texts of treaties, something that is virtually absent from, for example, Pufendorf's work. His approach represented a novel way of studying international law and one that, in the context of the early eighteenth century at least, was essentially outside of formal training at the universities, but which had an avowed focus on the practical needs of the diplomat.

Dumont was under no illusion about the relationship of those needs to the abstract moral principles that were increasingly informing

academic studies of natural law, culminating in the work of Wolff and Vattel, and there is a frankness of raison d'état in his discussion of the way that the value of studying treaties and negotiations is to understand how princes conceive their interests, to keep score in the competitive business of international relations, to have a wealth of diplomatic formulae to manipulate to one's immediate purposes and, at the most, to be able to expose attempts by rulers to break or manipulate the terms of the treaties they have previously signed.

As with other, similar works that laid the foundations for European public law – one might point, for example, to the work of the Abbé de Mably in the mid-eighteenth century (Mably 1758) – Dumont's was an essentially practical body of scholarship, for the most part constructed outside any formal university setting: he was trying to develop an account of the law of nations that would be serviceable for potential diplomats. The practice of private international law remained basically tied to the representation of clients in courts, and so retained much of its university, civil and natural law focus; but the public activities of international lawyers became increasingly oriented towards diplomatic relationships rather than judicial processes, and so the positivist–historical approach to the study of treaties pioneered by Dumont and a few others was to become a vital ingredient of legal doctrine during the later eighteenth century, as it gradually filtered back into the universities and inspired a flurry of textbooks on public international law that, as with Martens' influential early study, cloaked their basic focus on treaties as the primary source of international legal rules beneath the scholarly respectability of an often thin veneer of natural law theory.

Conclusion

Diplomatic historians often refer to the existence of an "aristocratic international" as a crucial ingredient of the solidarity of international society during the nineteenth century (for example, Anderson 1993: 121). To extend that idea, we might say that one of the essential elements of the unity of late medieval Christendom, more important than the always dubious and contested claims to "universal monarchy" made by Pope and Emperor, was an international of legal professionals, trained in similar ways to expertise in a shared *ius commune*, which could be applied in a variety of judicial and diplomatic settings to ensure the legal regulation of relations between princes. One theme that we may take from standard histories of the development of early modern international law is that this international of lawyers was undermined by the state-building efforts of absolutist princes, who, as they exerted control over law making and courts' jurisdictions, channelled the professional opportunities for lawyers down essentially nationalistic lines and made a highly specialised legal training less valuable as a qualification for diplomatic service. But it was also profoundly influenced by religious and educational reforms, especially humanism, that transformed the ways in which lawyers were trained and socialised into their profession in ways that fragmented the field. When a new common idiom was established towards the end of the eighteenth and the beginning of the nineteenth centuries, it was quite different from the old *ius commune*, being grounded instead in the comparative study of the national legal systems of "civilised" countries and the historical analysis of treaties, which, together, defined the European public law and permitted European states to exert considerable authority in redefining the terms of any extra-European law of nations that might be held to govern their relations with non-European peoples.

Changes in the professional community that practised international law were the other side of the coin to the conceptual and doctrinal changes that one may observe in the transition from Vitoria to Martens, via Grotius, Pufendorf and so on. It is not particularly helpful to ask whether one or

the other played the more decisive role. The doctrinal innovations of a Grotius, for which one must give credit to his phenomenally wide learning and individual brilliance at harmonising diverse sources into a coherent system, undoubtedly had a significant effect in helping to shape the new field of natural law and the law of nations that became an essential part of legal training in northern European countries in the late seventeenth century. But at the same time, if we ask why *De Jure Belli ac Pacis* was so enthusiastically received and so rapidly attained its status as a seminal work, a major part of the answer lies in the fact that a book of such stature was needed by a legal profession that had, thanks to humanist educational reforms at law schools, lost its old foundations on the *Digest* and the *Decretum*. Similarly, if we ask why the voluntarism that lurks in Grotius' system became so triumphant in the positivist legal science of the late eighteenth century, a major part of the answer to that question is that the ground was laid by changes in international arbitration and diplomacy (if not so much in private international law) that had made comparative national law and treaty histories essential: Martens' *Precis du Droit des Gens* was an ideal textbook for a field of public international law practised in such a manner.