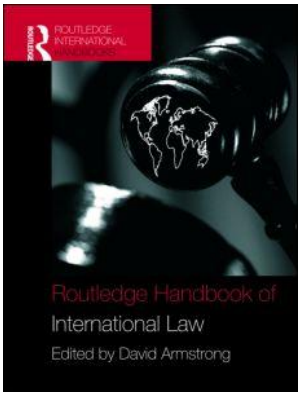

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The Legacy of the Nineteenth Century

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The legacy of the nineteenth century

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The period from the late eighteenth century to the First World War shaped both the humanitarian internationalist approach to international law and, through the vocabulary of legitimacy that accompanied the consolidation of the European states system, its emphasis on sovereignty, state power and the balance of power. Different national perspectives also began to emerge over issues such as colonialism and the law of the sea, with barely disguised national rivalries shaping much of the discourse. Underlying all this, we may discern a fundamental tension between international law as "apology" for state power – which was seen as essential to an effective system of international law – and as "utopia" – or a means of constraining state power. Towards the end of the century, they were expressed in a rhetoric that envisaged international law essentially as a social phenomenon. This chapter reviews some of the intellectual debate that accompanied these developments.

The long and short nineteenth century

Much of what we recognize as distinctively "modern" about twentieth-century political culture is a development of aspects of nineteenth-century thought and experience. This applies to international law as well. Its humanitarian internationalism draws inspiration from such nineteenth-century moments as the conclusion of the 1864 Geneva Convention for the treatment of the wounded in armies in the field, the delivery of the first important arbitral award in the "Alabama" dispute between Britain and the United States in 1872, and the convening of the first peace conference in the Hague in 1899. The establishment of the first university chairs in international law proper and the regularization of legal advice as part of the foreign policy of European powers in the last third of the nineteenth century configured the field in terms of a pervasive opposition between more or less "idealistic" and "realistic" approaches that still structure professional imagination in the field.

But like every commonplace, this involves simplification. The experience of the nineteenth century grew out of eighteenth-century European themes such as secularism, imperialism, and the tension between public law sovereignty and private rights of civil society that have accompanied and justified the expansion of diplomacy and war, on the one hand, trade, technology and European notions of "civilization," on the other. Twentieth-century lawyers have understandably looked back to the immediately

preceding years as delineating, for them, the sense of political and legal possibility. The powerful post-1919 association of international law with public international institutions – establishment of the League of Nations, Permanent Court of International Justice, International Labor Organization, among others – reflects efforts and proposals that emerged during the last third of the nineteenth century but whose roots lie further back in European modernity (see, especially, Kennedy 1987). The dynamic between historicism and rationalism, statehood and the "international community" that structures nineteenth-century legal doctrine and the obsession with the balance of power that does the same for diplomatic practice, rehearse eighteenth-century themes: the specter of revolution in Europe and the universalism that animates Europe's relations with the rest of the world develop aspects of Enlightenment thought. Nationalism is certainly one legacy bestowed by the nineteenth to the twentieth century. But its roots lie further back in the vocabularies of legitimacy that accompanied the consolidation of the (European) states system.

There is thus a "long" nineteenth century that encompasses the practice and thought about international law and politics as an outgrowth of European modernity – the formation of the nation state, the tension between sovereignty and liberal individualism, influence of technology and economic growth on state power, secularism, rationalism and belief in progress as a lingua franca between international elites. The nineteenth century gives form and constancy to such (and other) themes that lead into the twentieth century's most characteristic moments: the creation of world economy and a global technological culture; totalitarianism and total war; decolonization, environmental destruction, human rights. Two ideas are particularly important constituents of international law's "long nineteenth century": the view of history as "progress" and the association of "progress" with the becoming universal of the European state form.[1] Joined in Immanuel Kant's famous essay from 1784 on the "idea for a universal history with a cosmopolitan purpose" (Kant 1991), these ideas lie behind the development of international law from a philosophical preoccupation in the eighteenth century to an instrument of diplomacy and an academic discipline in the nineteenth and an institutionally oriented formal–legal technique in the twentieth century[2] – each period conserving something of the memory of its predecessor as a residue of assumptions and fallback positions.

By the same token, a break should be made around the year 1870. The emergence of a united Germany after the Franco-Prussian war (1870–71) completely transformed the structures of political, cultural and also legal hegemony on the continent.[3] Outside, European powers turned from informal to formal empire. Liberal ascendancy in European governments reached its peak, and the first signs of a new great power emerged in the western hemisphere.[4] The last third of the century and the beginning of the next until 1914 famously constitute a "short nineteenth century," which, for our purposes, may be defined as the moment when the consciousness of European elites had formed around a cosmopolitan worldview, expressed in cultural and political commitment to what the lawyers called "ésprit d'internationalité" (Röben 2003: 152–6) and projected in such institutional forms as the first professional journals (the *Revue de Droit International et de Législation Comparée* in 1869, the *Revue Générale de Droit International Public* in 1894) and associations (the *Institut de Droit International* and the *Association for the Reform and Codification of International Law* [later *International Law Association*], both 1873) (Koskenniemi 2001: 39–41 and notes therein). Multilateral diplomacy took on a legislative role at the Berlin Congresses of 1878 and 1885 and the two Hague peace conferences of 1899 and 1907. Peace societies that earlier in the century had focused on economic and social issues began to make

proposals for general and compulsory arbitration of international disputes and were joined by arbitration societies, national parliaments and even some governments (Hinsley 1963: 114–52). The first technical international organizations (the so-called "unions" such as the Universal Telegraphic Union of 1865 and the Universal Postal Union of 1874/1878) were set up to foreshadow what one influential international lawyer of the period already called "administrative law of an international community" (Martens 1883–87: esp. vol. 3).[5]

Much of the legal–institutional activism that emerged during 1919–39 as well as again after 1989 is inspired by or follows on initiatives made and ideas expressed in the last third of the nineteenth century. It is really that moment international lawyers remember when they speak about the nineteenth century (Kennedy 1996).[6] And yet, there is a point in retaining the years between the Congress of Vienna (1814–15) and the Franco-Prussian war (1870–71) in an account of the legacy of the nineteenth century as the *background* against which later developments should be understood. Many of the initiatives were made in reaction to the "dangerous" policy of the balance of power and the connected principle of legitimacy, translated in due course into external state sovereignty and the primacy of domestic jurisdiction. Where the beginning of the century, from the point of view of international law, was conservative and often nationalistic, the last third was liberal and cosmopolitan.[7] This is illustrated by the life of one key international law activist, the Columbia Professor Francis Lieber (1800–1872), who had come to the United States in 1827 as a refugee after having participated in revolutionary activities across Europe. By 1870 he had become the initiator of the professional organization of international lawyers and his work for the "Lieber Code" for the use of the Union armies in the U.S. Civil War was inspiring the adoption of humanitarian laws of warfare around the world (see Hartigan 1983; Röben 2003: 15–39). Lieber and his European colleagues looked for change as much as they wanted peace and stability and fitted those objectives together in an account of individual rights and the gradual civilization that would in due course extend to non-European peoples owing to what they hoped would be the increasingly enlightened policies of the powers themselves. The ambivalence of this optimism – a critique of state power and a simultaneous reliance on the beneficial effects of that power – was a major heritage passed from the fin-de-siècle to the twentieth century.

A divided legacy

But the memory of the Victorian century is far from uniform. First, it was a European century. For the world outside Europe and Europe's white settlement colonies, the nineteenth century organized itself in accordance with a different collective calendar, marked by different forms of *colonialism*. This was not a uniform experience either for the colonized or the colonizing power. The techniques of colonization varied between different moments and locations. Until late in the century, British overseas domination was maintained by private actors, usually organized in colonial companies that were chartered to carry out some administrative activities, while French and Russian colonization took place through official policy and often by military conquest. Towards the end of the century, however, the technique of the "cat's paw" had shown itself inefficient and open for flagrant mistreatment of the populations so that the British and even the Germans who as latecomers had opted for the technique of informal influence moved to formal annexation (see Anghie 2005: 32–114; Koskenniemi 2001: 98–178).[8]

The transformation from informal to formal empire is the century's principal colonial theme.[9] It is accompanied by a bewildering variety of legal forms applied in different

localities, ranging from unequal treaties, hinterland claims, arrangements for special "treaty ports" (Japan and China), the use of consular jurisdiction or mixed tribunals so as to exempt Europeans from local jurisdiction, to different kinds of protectorates or other kinds of dependency in Africa and the Far East. No single legal regime and thus no single experience of "colonial international law" ever emerged. The same concerns the European use of the vocabulary of "civilization" so as to mark levels of development of non-European communities. Although distinctions between "civilized," "half-civilized" (or "barbarian"), and "savage" communities were routinely made, they did not link to clearly identifiable legal forms of institutions (see Gong 1984; Koskenniemi 2001: 132–6). Colonialism began as a "science" only within the mandates system of the League of Nations in the 1920s and then in theories of "development" in the 1950s and thereafter (Anghie 2005: 182–7; see, further, Trubek and Santos 2006). Until then, the meaning of a term such as "protectorate" (or "colonial protectorate") or the relationship between local and European laws, for example, depended completely on changes of policy fashion in the capital – usually on how much money was available for administrative or commercial investment in the colony.

International lawyers were enthusiastic colonialists and, for example, greeted the allocation of the Congo to King Leopold at the Berlin Conference of 1885 with satisfaction.[10] But it says something about the overwhelming predominance of Europe that even the principal anti-colonial vocabulary was European: sovereignty, liberal humanitarianism, or the principle of "nationalities" that turned into the call for self-determination after the mid-twentieth century. In both of its forms – as memory of alien rule and a desire for collective selfhood, colonialism defined much of the international law and politics of the twentieth century so that the paradoxes and ambivalences that associate with later pursuits of "universal" international law cannot be understood without reference to the colonial experience.

Second, the legacy of the nineteenth century is also divided inasmuch as its development in different parts of Europe and the world followed different local experiences and variations of political and legal culture. In the early years of the century most publicists continued to write about a *droit public de l'Europe*, one that was adopted from practices and writings of the pre-revolutionary period. Its focus was on the laws of warfare, diplomacy and treaty making, and it often adopted the principle of the balance of power as its starting point.[11] The continued widespread use of Emer de Vattel's *Droit des Gens ou Principes de la Loi Naturelle appliqués à la Conduite des Nations et des Souverains* (1758) remained an anachronism, however, and the old-fashioned naturalism of its theory and the uncertainty about who the subjects of the law of nations really were, reflected in its title, called out for new articulations of the field. It was one thing to argue in terms of legal theory according to which owing to the absence of a common sovereign above them, princes and nations remained in a state of nature, and another to come up with reliable rules and institutions as deductions from it. In the 1830s and 1840s publicists from different parts of Europe were voicing concern about the state of the law of nations – either, as the Germans did, lamenting the absence of "system" from the treatment of the disparate materials or then, with British students of Bentham, worrying over the absence of mechanisms of enforcement other than that of the elusive "public opinion."[12]

Alongside this old law, and with increasing intensity towards the end of the century, specific French, British, German, Russian, American, and Latin American international law themes and priorities began to emerge. There was an active internationalist legalism in small countries such as Belgium, Netherlands, and Switzerland and liberal lawyers from each became leading members of the new profession towards the end of the century

(see Koskenniemi 2001: 1–97). Turkish and Italian voices put forward proposals focusing on specifically Turkish or Italian themes such as reform of consular jurisdiction or the application of the "principle of nationalities."[13] Legal attitudes towards colonization were influenced by whether one's experience had been expansion by trade (as in Britain) or warfare (as in France) and how early or late one had joined the colonial game. The way in which law of the sea issues, for example, were discussed reflected one's position either as a maritime or a non-maritime power. In the long struggle that began in 1815 against the slave trade many nations – especially France – continued to oppose the British position that navies ought to have the right of visit on suspected slavers as an attempt at illegitimate extension of Britain's maritime dominance.[14] In fact, much of the writing that came out from France in the first part of the century was programmatically oriented against British policies.[15] A self-conscious "particularism" was developed in Latin America whose colonies had used the Napoleonic incursion into Spain in 1808 to proclaim independence from the motherland. A strong bias against external intervention, supported since 1823 by the Monroe Doctrine, was buttressed by an indigenous effort to complete the "civilization" of the continent by various forms of legal cooperation undertaken between the elites of the new states, well represented in the United States and (especially) continental Europe by lawyers such as Carlos Calvo and later Alejandro Alvarez.[16]

Even differences in legal education played a part. Whether one saw public international law as a sister to private international law (as in Italy or France), or whether it was taught as "external municipal law" principally in connection with domestic constitutional principles about treaty ratification (as in Germany) was not at all irrelevant to how one saw the direction and possibilities of international reform – for example, whether one was to think of it in terms of the formal "constitutionalization" of the international realm or whether one saw its development in common law terms (as Fredrick Pollock did) as spontaneous custom and the accumulation of case law from arbitral tribunals and a future international court.[17] Nevertheless, the predominant role of the textbook writer and indeed of the (often many volumed) textbook as a kind of functional equivalent to the code book seemed unaffected of these divisions and remained often the most tangible aspect of the profession.[18]

The legacy of nineteenth-century international law is not a uniform datum that would translate a homogeneous experience into linear causalities or associations of meaning in the subsequent political–legal world. The century itself was traversed by several important divides: between its early and late parts; between Europe (and the United States) and the rest of the world; and between different European–American experiences. The following sections are organized by way of giving an eye to themes that consolidate in the nineteenth century and become important, even decisive, aspects of the legal consciousness of the period after 1919.

Doctrines: Between apology and utopia

International law arose as an aspect of the early modern political theory of natural law – *ius naturae et gentium* – in the late sixteenth and early seventeenth centuries. In the course of the eighteenth century, it had diverged into three distinct streams. One had developed especially at universities in post-Westphalian Germany in connection with the project of consolidating the power of the territorial states.[19] For it, the law of nations was an aspect of the government of the state in its external relations in view of preserving and strengthening the security (and sometimes the welfare) of its population.[20] The view of international law as "external public law" remained influential in the German-speaking realm well into and even beyond late

nineteenth century. It derived international law from the will of the state and focused on international law's connections with constitutional law and the hierarchical position of treaties in the domestic legal system. Outside Germany, it was often taken to imply a rather minimal conception of a state's international engagements and sometimes indicted as an aspect of the kind of "positivism" and sovereignty centeredness that gave legal expression to the extreme nationalism that was responsible for the First World War.[21] Because its standpoint was that of the state, it was, according to critics, unable to create a law that would be binding on the state (see Kelsen 1928).

Another stream of universalist–naturalist thought developed in France as an aspect of the criticism of the *ancien régime*. From Fénélon and the Abbé de Saint-Pierre, themes about perpetual peace and universal humankind had been taken into the writings of the *philosophes* – rarely, however, with any well-formulated institutional or legal proposals (for an overview, see Bélissa 1998). Rousseau remained skeptical of the extension of enlightenment ideas into the international world and regarded the balance of power as still the best guarantee for peace (Rousseau 1761 [1756]). Even Montesquieu's *Esprit des Lois* limited its view of international law to one abstract principle, namely that "[d]ifferent nations ought in time of peace to do to one another all the good they can, and in times of war as little injury as possible, without prejudicing their real interests" (de Montesquieu 1949: 5). In 1795 a proposal was made in the French national convention for the adoption of a declaration of the rights and duties of nations that would do for the international system what the *Déclaration des Droit des l'Homme et du Citoyen* had done at home. The declaration was never adopted but it inspired critical reflection from lawyers such as the Göttingen professor and later diplomat Georg Friedrich von Martens (1796: iii–xvi) who attacked it as an assemblage of pious wishes about equality and peacefulness that, as long as men remained men, had no chance of ever being realized.

Revolutionary thought entered nineteenth-century France, Germany and other continental contexts (to the extent that it did) in the form of a variety of theories of individual, often constitutionally argued human rights.[22] It received little hearing from the international law theories of early nineteenth century – and even less from the diplomacy of the period – but it did gradually, in a domesticated form, become part of the professional rhetoric of the legal activism of the century's last third (see, especially, Bluntschli 1872: esp. 18–20, 26–7, Koskenniemi 2001: 54–7).

Between the *Fürstenrecht* produced and developed in older German natural law and the revolutionary abstractions of the French polemicists, the professional mainstream turned away from natural law as a set of excessively abstract (and in this sense arbitrary) maxims that could not form part of a practical *ius publicum Europaeum* and instead concentrated on systematizing and interpreting treaties and European practices, understood as a working system of largely customary law.[23] For Bentham (1843: 535–71) who famously coined the term "international law" to replace the older "law of nations" the task was to project the search of the greatest utility of the greatest number from the domestic to the international field. Neither of his students, James Mill and John Austin, continued in this vein, however, although each sought to provide a realistic view of the field, the former by stressing the role of sanction in law and imagining public opinion – public shaming – in this role, the latter more skeptically giving it up as a legal topic and relegating it into the field of "positive morality" altogether (see Austin 1954 [1832]; Mill 1825; see also discussion in Sylvest 2005: 12–18).

The success of Vattel's old *Droit des Gens* from 1758 still in the nineteenth century could also be understood in terms of the useful compromise it contained between the naturalist legitimation of the diplomatic system and the practical usefulness of the exposé of the

techniques of foreign relations it contained, providing a credible interpretation of war, treaties and diplomacy as aspects of an actually operating legal system. Owing to the turn in doctrine to commentary on treaties and diplomatic practices, many historians have labeled the nineteenth century an era of "positivism" (see, e.g. Neff 2005: 169–76, 2006: 38–46; Nussbaum 1954: 232–6). The ambiguity of the expression "positivism" notwithstanding, this ignores persistent strands of "naturalism" in the century's legal doctrine, constantly referring back to the moral and civilizing force of European laws and practices. The definition of the field by the British lawyer Sir Robert Phillimore (1879) captures a widely shared understanding: "From the nature of states, as from the nature of individuals, certain rights and obligations towards each other necessarily spring . . . These are the laws that form the basis of justice between nations." The U.S. lawyer Theodore Woolsey (1879: 14) expressed the same idea by criticizing the view that international law could be understood in "narrowly" contractual terms:

> In every contract it may be asked whether the parties have a right to act at all, and if so, whether they can lawfully enter into the specific relation which the contract contemplates . . . A voluntary code of rules cannot, for this reason, be arbitrary, irrational, or inconsistent with Justice.

From such widely articulated basis, it became possible for the novel profession to subject any diplomatic rules or practices to the critique of its moral conscience. Law, mainstream lawyers were saying (or at least implying), did not come about (merely) by treaties between sovereigns (although these were an important source) but through a process of consolidation from practices of European societies, understood to reflect the increasing "civilization" of international contacts that could be laid down in works of scientific codification (see, especially, Bluntschli 1872). When international lawyers organized themselves in 1873 in the *Institut de Droit International*, they defined their profession as the "juridical consciousness of the civilized world" and set up a program of codifying international law in scientific restatements that may have regarded European practices as authoritative (and were in this regard "positivist") but received this from a (naturalist) view of the direction of progress in the "community of civilized nations" (Koskenniemi 2001: 39–41).

While many nineteenth-century lawyers stressed the need to study international law on the basis of treaties and other European practices so as to avoid collapsing it into dubious (and inherently political) moral preaching, others used it to critique the policies of European powers, rejecting balance of power or "sovereignty" as the law's authoritative foundation. Both groups were hoping to construct space for international law beyond (mere) "politics," understood as "subjective," "arbitrary," dangerous, and so on, but conceived "politics" in contrasting ways, some associating it with moral abstractions, others with state power. To reduce international law to either would have meant doing away with its quality as "law."

This inaugurated the basic doctrinal dynamism of twentieth-century international law as well. On the one side, there has been the effort to support international law's reality and effectiveness by highlighting its close relationship with state power – on the other side, the pursuit of autonomy for the law from the policies and diplomacy of states so as to ground its moral and political appeal.[24] But neither path could be pursued irrespective of the other.

To explain international law by reference to principles beyond diplomacy and state power undermined its concreteness and the verifiability and reliability of its conclusions. To focus too intensively on state behavior or will reduced it into an instrument of shifting policies and failed to give room to the profession's civilizing ethos. The dilemma of

"apology" and "utopia" thereafter came to structure the way abstract reflection about the nature and progress of international law would be conducted in the twentieth century in terms of the opposition of more or less "idealistic" and "realistic" approaches. Increasingly, however, this type of abstraction was set aside as inconclusive and was replaced by another type of vocabulary, namely the debate about international law as a "social" phenomenon. The substitution of the (old) language philosophy by vocabulary of the "social" was another legacy from the nineteenth century to the way international law has been understood and debated in the twentieth.

Practices: International law and society

That international law was a "social" phenomenon meant above all two things. First, it was to be understood *historically*, so that determining its content would have to involve reflection of how people – rulers, states and lawyers – have thought and acted in the past. The nineteenth century inaugurated the practice of treating international law as an outgrowth of European diplomatic history from the emergence of the nation state and from the Treaties of Westphalia (1648), supported by a continuum of philosophical reflection from Hugo Grotius and the Spanish scholastics to present pragmatism. Alongside specifically historical works such as those by Ward (1795) and Wheaton (1853), textbooks and monographs invariably included opening sections treating the diplomatic and literary histories as carriers of political and legal ideas from which rules were derived in a way that was specific to each context or period. Although the high point of Savigny's historical school was over by the middle of the nineteenth century, key internationalists such as Bluntschli or Westlake had been trained in thinking of the law in historical and cultural terms against what they had learned to attack as the rationalist abstractions of their eighteenth-century predecessors. When Henry Sumner Maine (1887) replaced Westlake at the Whewell Chair of International Law at Cambridge in 1887, he had no problem in conceiving of the field in terms of European developments and Roman law techniques.

Second, the historical approach involved a *teleology* (Neff 2006: 45). Late nineteenth-century works uniformly assumed that European modernity constituted the highest point of human civilization and that it would also form the goal of developments elsewhere. This would involve cessation or humanization of warfare, advancement of economic liberalism and the all-round cultural and political progress of "modernity." History developed through "stages" to ever expanding forms of civility and culture.[25] Even the century's early writers who focused on the practices carried out under the policing eye of the great powers assumed that international law's growth would follow the increasing economic and cultural contacts between nations, their interdependence – a word that Francis Lieber (1868: 22) claimed to have invented. Public opinion would play a great role in this regard.[26] Few lawyers expressly adopted the language of Immanuel Kant's 1784 essay about the "Idea for a universal history with a cosmopolitan purpose" but almost all shared its major premise – namely that with the progress of modernity, the world would be gradually united in a community of individuals organized under peaceful republican constitutions (Kant 1991).[27] The argument about a "liberal peace" – the increasing economic cost of warfare – that had been made by Kant and Benjamin Constant became part of the educated legal common sense.[28]

Nevertheless, with the significant exception of a number of religiously inclined activists in the United States,[29] most lawyers stayed aloof from the peace movement of the 1840s and 1850s composed in part of political activists, even revolutionaries who saw no reason whatsoever to regard the mores of European elites as rudiments of a world

government (see, e.g. Proudhon 1927 [1861]). For them, it was part of the problem rather than the solution. With the successful settlement of the *Alabama* Affair in 1872, however, the peace movement turned increasingly to international law and arbitration and lawyers began to participate in its ranks (see also Schou 1963: 305–37). Tension between the two groups – lawyers and pacifists – continued to be reflected for example in the almost simultaneous establishment in 1873 of the two societies, the *Institut de Droit International* and the Association for the Reform and Codification of International Law, the former consisting of a limited number of elite jurists often with close contacts to national policy leadership, the latter a more broad-ranging forum for internationalists bent on the preparation of an international code for the establishment of peace (Abrams 1957).

It was only gradually in the course of the eighteenth century that "states" came to be regarded as subjects of international law alongside kings, or "sovereigns," peoples and nations (Schröder 2000). This use was stabilized as the administrative structures of the European nation state were consolidated in the early nineteenth century. Foreign affairs were organized as part of state administration and international law turned from philosophical speculation to governmental practices of negotiation, treaty making and formal diplomacy. However, accepting that international law's proper subjects were "states" and that the law itself should be seen as an effect of "state will" gave rise to the puzzle about how international law could possibly be "real," that is, both an effect of state will and still binding on that same will, especially in the absence of a supra-state institution of law enforcement.[30]

If the theory of sovereignty arose as a tool for the internal pacification of European societies in late sixteenth and early seventeenth centuries, its external implications began to seem problematic as the naturalist frame in which it had originally been argued and limited became increasingly thin. As long as sovereignty could be seen in sociological or cultural terms and its different forms ("absolute" or "popular" sovereignty, state sovereignty) could be understood to reflect the histories of European societies, there was no problem to fit it into a teleological frame pointing to progress and future unity. Separated from such an understanding, however, and argued in universal, even logical terms as unconditional independence, on the one hand, "sovereign equality," on the other, it began to seem incompatible with any idea of a binding legal order.

Nevertheless, the idea that state sovereignty did not signify any independence from international law became part of the legal common sense towards the end of the century. The predominant way to reconcile sovereignty with a binding international order was received then (as it has been since) from the raison d'état tradition that had always separated the "arbitrary" interests of states from their "real" interests – the latter being covalent with the presence of a robust system of keeping one's promises (see, especially, de Rohan 1995 [1638]). This separation was expressed in the now odd fashion that was carried over from the eighteenth century into the nineteenth and emphasized the need of a properly "scientific" approach to international law – a view highlighting the role of academics in their role as counselors to government and of the function of law as a technical knowledge about the management of foreign affairs. Sovereigns were not to act out of short-sighted or otherwise elusive "passions" but were to follow what best comparative and historical – and of course legal – studies would suggest was in their long-term interests (see Hirschman 1997). It is perhaps no wonder that this view was most forcefully represented in German public law that had since the Peace of Westphalia been accustomed to examining the relations between the Holy Roman Empire and the territorial estates precisely in view of a sovereignty that would be compatible with the harmonious co-existence of both.[31]

An influential extension of these doctrines to international law was accomplished by the Austrian public lawyer Georg Jellinek in 1880 as follows. States are bound by treaties because they will so. But this does not mean that they could discard their obligations by changing their will. For that will is not free. It is limited by what Jellinek, borrowing his vocabulary from what earlier *ius publicum* used to label *Staatszweck*, the purpose of the state, namely to provide protection and welfare to its people (see Preu 1980: esp. 107–25). This was possible only in cooperation with others. The nature of the international world – *Natur der Lebensverhältnisse* – required that states keep their word (Jellinek 1880). Jellinek, a friend of Max Weber's later in life, like generations of international lawyers after him, employed a sociological naturalism to understand international law: It is binding because that is socially useful.[32]

From the late nineteenth century onwards, international lawyers have been critics of "sovereignty" as egoism, arbitrariness, and the absolutism of state power. The contrary to sovereignty was international law. Jellinek's sociological explanation to international law's binding force was only the sharpest formulation of what fin-de-siècle jurists often discussed in terms of the "Austinian challenge." Under it, being bound by one's promises was not really *derogation* from sovereignty but an *effect* of sovereignty: a construction formalized by the Permanent Court of International Justice in the Wimbledon case in 1923 (S.S. Wimbledon Case: 9–10). It also allowed the critique of *any* existing international arrangement as either too respectful of sovereignty (and thus reform in an internationalist direction) or then too far reaching derogation from it (and thus a justification for claims of autonomy and national jurisdiction). The legacy of the nineteenth century was not excessive deference to sovereignty (arguments against such deference were common then as they are today) but rather the emergence of "sovereignty" as the key *topos* of international law, leading the law into a formal and procedural direction, away from views about the substantive rightness or wrongness of particular types of behavior (Kennedy 2006: 61–62).

Into formalism

The focus on sovereign statehood as the law's operating center made it possible to conceive the various legal institutions and principles by analogy to the domestic law of a liberal society that imagined itself as a contractual arrangement between originally free and equal individuals: The "rational and moral grounds of international law," Woolsey explained, are "the same in general with those on which the rights and obligations of individuals in the state, and of the single state towards the individuals of which it consists, repose" (Woolsey 1879: 14). The significance of the point lies in the way it proposes to end the debate about whether in matters of state the morality of individuals or a special morality of states would apply. In fact, there would be no "morality" at all, but a set of neutral and objectively determinable formal rules that would henceforth empower, coordinate and limit the activities of states in the international world to the practical satisfaction of all. To found the law on "sovereignty" instead of some substantive rights or wrongs would produce a law that would be both realistic and forword looking, a sword and a shield, as the moment might require (see also Koskenniemi 2005a: 143–54).

Accordingly, the law of territory, for example, was consolidated in the nineteenth century following domestic doctrines about the procedures to be followed in the acquisition and possession of as well as succession to property (see further Carty 1986). The rule that grounded territorial rights on effective occupation crystallized in the nineteenth century as against merely symbolic forms of annexation thus transposing a Roman law

notion that had been already included in the century's German and Swiss civil law codifications at the international plane (Lauterpacht 1927 [1923]: 112–16). Although lawyers continued to make the distinction between ownership and jurisdiction, their continued overlap in argument resembled the earlier difficulties of keeping up the analytical separation between the legal notions of *dominium* and *imperium*, that is, domestic and international types of authority (Lauterpacht 1923: 91–99).

Likewise, nineteenth-century developments in the law of treaties came about as elaborations of general principles and Roman laws of contract: The right of making treaties was thought as one of the essential attributes of sovereignty in the same way as the right to make contracts is an aspect of free personhood (Davis 1908: 234). Accordingly, rules concerning the conclusion of treaties, conditions of validity, binding force, interpretation, application and termination were all derived from a contractual analogy that played on the familiar opposition of "will" and "reason," *voluntas* and *ratio* in the explanation of the binding force of treaty law and in the interpretation of treaty provisions (see, e.g. Koskenniemi 2005a: 333–45, Zoller 1977: 47–95, 202–44). Treaties are binding because and to the extent that they capture the "will" of the parties – and yet what counts as a valid expression of will and when might will cease to be binding is constantly measured against a strong set of background assumptions about the injustice of particular (types of) treaties (see Distefano 2004).

The way concentration of the law on formally equal sovereigns led to a proceduralization of its substance is easiest to see in the laws of warfare. From the outset of the century, doctrines of the just war were set aside and war became a part of the political everyday, a procedure (a "duel") within which states sometimes chose to fight out their quarrels (see, e.g. Westlake 1910: 81). For this purpose, it was conceived as a public law institution – the "state of war" – strictly limited against "peace" and in which special rules of the game would apply. Professional lawyers concentrate in great detail on working out what those rules are, highlighting for example, that the public nature of war would no longer provide room for private armies or privateering, definitely abolished in 1856, or the indiscriminate looting or destruction of private property situated in occupied territory. As a public law procedure, war was strictly limited to activities of the belligerent parties in a way that led into detailed discussions of rights and duties of neutrality as well as efforts to keep war from disturbing private commerce. For the humanitarians, too, the strategy consisted in maintaining strict separation of war from peace so as to then diminish its scope as much as possible. It is striking in what detail nineteenth-century lawyers lay out procedures concerning the identification and treatment of contraband goods, for example, assuming that even in the midst of a war – at least war between "civilized nations" – the belligerent powers retain the ability and willingness for cool analysis and reason, a "sunny optimism" about the business of fighting (Neff 2005: 177–201).

But even in the nineteenth century, a shadow of doubt hung about the power of these formal definitions and procedures. For example, after the question of the justice of the war had been set aside, it followed for practically all the lawyers that the older right to punish the wrongdoer completely vanished. This would be contrary to the independence of them. But few, if any lawyers, once they thought about the matter, took this view to its apparent conclusion. For the world seemed also full of injustice, oppression, and violence that "civilized nations" needed to deal with. So most lawyers, too, opened the door for the use of force in situations involving an "extreme case of outrage . . . when a . . . choice to . . . protect the weak abroad, or to punish the oppressor, ought hardly to be disobeyed" (Woolsey 1879: 19; similarly Hall 1884). Both in state practice as well as in the writings of leading jurists, humanitarian

considerations were continuously invoked in defense of military operations in the frontiers of the Ottoman Empire (Neff 2005: 46).

Conclusion

Perhaps it is here, in the ambivalent relationship between the legal form and the substance covered by it where the principal legacy of the nineteenth century to the subsequent years lies. The suggestion was that the problems of the world could be best dealt with in a technical way by employing a formal concept of sovereignty, juxtaposed and disciplined by formal rules and institutions. When the First World War put an end to the Victorian optimism of the preceding years, the conclusion many drew was that the law had failed because it had not gone far enough in this project. The interwar years thus saw an intensifying critique of formal sovereignty on the part of the lawyers, accompanied by an effort to bind it down to increasingly complex technical rules and institutions within and beyond the League of Nations that were intended to tie down the period's explosive energies. The repressed returned, however, and for much of the subsequent post-war era, the nineteenth century and its offspring, the interwar system, survived principally as a memory of political innocence or of cynicism in the garb of innocence, depending on the political preference of the analyst, that contained within itself the power of its undoing. The analysis may be correct but insufficient. For the nineteenth-century practice of dealing with political power – using it, disciplining it – through public law sovereignty and formal diplomacy also liberated the most powerful social forces to mold the international world in accordance with their structural logic and embedded preferences. The legal invisibility – and irresponsibility – of much that has taken place within the "empire of civil society"[33] is heavily indebted to European political, social and economic history so that among the legacies of the twentieth century to the present has been a conception of international law that is severely limited in ambition and of marginal significance as a platform over which the struggles for the distribution of the world's economic and spiritual resources are being waged.

Notes

1 This is the so-called "domestic analogy," absolutely central to twentieth-century international legalism. See, especially, Lauterpacht 1927 and, for a famous critique, see Carr 1946: 22–62. For a general discussion, Suganami 1989.
2 For a description of the political ethos of twentieth-century international law, see Koskenniemi 2007.
3 A significant aspect of this was the force with which German public lawyers redefined the problems of international law in terms of the vocabulary of the *ius publicum*, developed after the peace of Westphalia to discuss the relations between the territorial states and the imperial centre. See Koskenniemi 2008.
4 I have tried to capture the legal sensibility at that moment in Koskenniemi 2001.
5 For an excellent review of the development, see Vec 2006: 21–164.
6 The contrast between early and late nineteenth century international law is discussed in Laghmani 2003: 161–66.
7 This contrast is made evident in Charles Vergé's introductory essay to the second French edition of Georg Friedrich von Martens' textbook of 1864 (Vergé 1864: i–lv).
8 For an older study, see Fisch 1984. For a recent analysis of the spirit of colonialism as it was received in the interwar era, see Berman 2007: 131–81.
9 The classic analysis is Robinson and Gallagher 1981.
10 See the declaration passed by the *Institut de Droit International* on the occasion of the 1885 Berlin conference (Institute de Droit International 1885: 17–18), and, generally, Koskenniemi 2001: 155–66.
11 For a provocative but not incorrect discussion, see Schmitt 1988: 111–85.
12 For the former, see von Stachau 1847 and, for the latter, Austin 1954 [1832]: 141–42; Mill 1825.
13 On the Italian tradition, see Catellani 1933.
14 The debate was waged throughout the century, and culminated in the adoption of the

so-called Brussels Declaration of 1890 that provided for a limited right of visit. France never joined the Declaration, however, instead preferring to apply the earlier set of bilateral treaties. See Kern 2004.

15 For one at the time famous example, see Hautefeuille 1868.
16 For an insightful discussion, see Obregón 2006: 247–64. A conventional account is Espiell 2001.
17 The terms of the debate as it still continues today are clearly put by Pollock 1916.
18 For a thorough, annotated overview, see Macalister-Smith and Schwietzke 2001.
19 Its most influential representative was Samuel Pufendorf who adapted the natural law theories of Hugo Grotius and Thomas Hobbes into a synthesis that could be applied to the Holy Roman Empire and its territorial states but that could also be used so as to understand the relations between European states more generally. See, especially, Pufendorf 1934 [1688].
20 For a discussion, see Koskenniemi 2007.
21 For this interpretation, see, especially, Lauterpacht 1933.
22 For an overview of the situation in Germany, see Klippel 1976: esp. 136–97.
23 Aside from Martens, see also Schmelzing 1818: esp. 9–19. From the Francophone realm, see de Rayneval 1803.
24 This is the theme of Koskenniemi 2005b.
25 A formal doctrine of the "recognition" of the situation of different communities on such stages is contained, e.g. in Lorimer 1884: 333–59.
26 See, e.g. the manifesto in Rolin-Jaequemyns 1869: 225–6.
27 For one significant expression of this cosmopolitan optimism, see von Mohl 1860: 599–636.
28 Nicely expressed in Renault 1932: 3–5.
29 For a review, see Janis 2005: 97–116.
30 For a recent reflection of this nineteenth-century debate, see Distefano 2004, esp. 126–40.
31 For an overview, see Gross 1975.
32 Although but few have used expressly sociological language to express this. Behind generalities about *ubi societas, ibi jus*, most international lawyers have persisted in speaking in formal terms about treaties, customary laws and general principles law – the three legal sources referred to in Article 38 (1) of the Statute of the International Court of Justice.
33 See Rosenberg 1994.