

Vol. 10, No. 1 • JANUARY 2025

Jus Gentium

Journal of
International
Legal
History

TALBOT
PUBLISHING

INTERNATIONAL LEGAL HISTORY, GROTIAN STUDIES, AND PERESTROIKA

WILLIAM E. BUTLER
Of the Editorial Board

Kaj Hobér, *The Perestroika Era and International Law*. Cheltenham/Northampton, Edward Elgar, Publishing, 2025. viii, 279 p. Casebound. \$140.00. ISBN 978-1-0353-3774-3

Martine Julia van Ittersum, *The Working Papers of Hugo Grotius: Transmission, Dispersal, and Loss, 1604-1864*. Leiden/Boston, Brill, 2024. xxvi, 705 p. Casebound. \$275.00. ISBN 978-90-04-53600-5 (Brill's Studies in Intellectual History 343)

Randall and Anne Peters (ed.), *The Cambridge History of International Law. Volume I: The Historiography of International Law*. Cambridge, Cambridge University Press, 2024. xx, 433 p. Casebound with dustjacket. \$160.00. ISBN 978-1-108-48769-6 (General Editor: Randall Lesaffer)

Between 1968 and 1992, nearly a quarter century, Jan Henrik Willem Verzijl (1888-1987) published nine volumes in eleven of his *Historical Perspectives on International Law*, two of which appeared posthumously. A heroic effort that experienced several mergers of his publishers, the full set (of which few are in private hands; it took the present reviewer years to accumulate his own) being difficult to find. According to the Brill website, the entire set became available in e-book form in individual volumes on 30 December 2024; the price of eleven volumes would come to about \$4,000 in this form. Verzijl's birth came months after the passing of François Laurent (1810-1887), who had produced an eighteen volume *Histoire du droit des gens et des relations internationales* (1865-1879). The impressive *sitzfleisch* of earlier generations has given away to collective works, of which the latest is the Cambridge

History of International Law, anticipated in thirteen volumes, as follows:

- I: The Historiography of International Law
- II: International Law in Asia
- III: International Law in Africa, the Americas, and Oceania
- IV: International Law in the Middle East and the Mediterranean during Antiquity
- V: International Law in Medieval Europe
- VI: International Law in Early Modern Europe
- VII: Western International Law (1775-1870)
- VIII: International Law in the Islamic World
- IX: International Law in the Age of Empire (1870-1920)
- X: International Law in the Time of the League of Nations (1920-1945)
- XI: International Law during the Cold War (1945-1990)
- XII: International Law beyond the Cold War
- XIII: The Development of International Law

The enterprise is off to a productive beginning and will not appear in consecutive order: volumes III and X are also announced for Spring 2025 publication.

Fourteen authors contribute twelve chapters in Volume I. Randall Lesaffer sets the scene in an ambitious essay to preface the entire undertaking: “Scope, Scale and Humility in the History of International Law” (pp. 1-46). The series is designed to “foster contributions towards a global history of international law along three lines” structured along a range of “choices”. The first range addresses the “concept and epistemology of international law” from “direct antecedents” of “major experiences, systems, and traditions” which transcend the term and concept of “State” in favor of the more supple “polities” (the present reviewer would prefer “communities” but applauds the effort) and means, *inter alia*, investigations of communities within empires and, having regard to recent finds in archeogenetics, communities which preceded empires; that is, into the earlier history of humankind. Another choice favors moving beyond or behind the distinctions between private and public law, a paradigm which “distorts pre-nineteenth historical realities” (p. 37). The series is designed to “break through” the public/private divide and engage “non-official agents and actors in the history of international law” (p. 39). Lesaffer makes the interesting observation that the term “law of nations” or “jus gentium” might be regarded as a broader and more fluent term

for the series rather than the Benthamite “international law”, but concludes that “law of nations” has lost its fluency and may now be supposed to be so closely identified with public international law as to include transnational, common, or pre-Westphalian law.

The second choice engaged issues of geography and periodization. Comparative international law underlies the first without question: “for most of history, different regional and subregional experiences, systems and traditions” for regulating relations among communities and their populations, “of which the European” was merely one. Whether from the second half of the nineteenth century, however, “existing regional systems disappeared or were marginalized” or “were subsumed” into a global regime is more doubtful. Perhaps the authors of this series will undertake to convince the readership of the contrary. The “master narrative” of the “European origins and global expansion” of international law is essentially a matter of self-deception; writers as astute as Robert Plumer Ward (1765-1846) identified the regional character of the law of nations (1795). For this series, a welcome regionalization has triumphed: volumes II to VIII, and parts of volume I, are to address different regional systems and traditions prior to the “rise of global international law” (whenever that happened). This means the areas of the globe most under-researched, and it will be interesting to see the archival and doctrinal discoveries necessary to truly accomplish this welcome objective.

Here one wonders whether Lesaffer is creating “straw men”: The series, he says, will distinguish between experiences, systems, and traditions. This becomes especially crucial to addressing pre-Westphalian developments within humankind. Experiences are defined as “engagements with the inter- or trans-polity relations that did not solidify into a legal system” (p. 41). A “system of international law”, however, is a “more or less” coherent body of law that “developed through continuous, relatively intense relations” between communities and their members in “a certain period and region”. The question with respect to the early “experience” of mankind is what constitutes “coherence”, “continuous”, “relatively intense” and what is the evidence for any of these criteria: we are dealing with an intangible, evidence for which may be confirmation of the existence of commercial relations, diplomacy, warfare, peace-keeping, treaties, and so on, but fragmentation of likely evidence suggests that conclusions, or at least early speculations, are likely

to be little more than that. Are we not imposing a set of criteria too demanding and self-serving?

For a legal tradition, Lesaffer speaks of “several systems which may not necessarily have developed continuously or which co-existed in a given part of the world but shared the same foundational culture, institutions or ideas”.¹ It is entirely appropriate, in this reviewer’s opinion, for Lesaffer to have recourse to an important and influential treatise on comparative law that does not address questions of the law of nations. That is one of the nexuses between comparative international law and comparative national law.

Anticipating later chapters in the series, of which he may have awareness, at least insofar as supported by recent publications, may leave us with the same shortcoming of which we accuse our predecessors: being victims of the blinders of contemporary scholarship. In other words, the universalist does not see the limitations of the regionalist. We, for example, are inclined to see the Near East as the region in which the earliest evidence of international law exists. And it may be that ultimately this perception will be confirmed. However, both Africa and China are possible competitors, but under-researched. These are open issues and deserve to be treated with greater tentativeness than we are accustomed to assume.

Promising indeed is the third choice of the editors: to organize the chapters around five thematic threads which most systems and traditions are believed to have performed: (1) the division of space and resources; (2) making war and peace; (3) trade, movement, and communications; (4) dispute settlement; and (5) diplomacy.

The remainder of Volume I is divided into two Parts. Part One is “The Historiography of International Law: Methods and Approaches”. Chapter 2 (Nehal Bhuta) undertakes a searing account of the Euro-centrism of prior histories of international law which, not unexpectedly, produce a European perception and justification of European policies in international relations. Euro-centric they certainly are, but there are no comparable competitors. Earlier civilizations offered nothing of their own except, at best, fragmentary evidence of their existence and patterns of relations. A global history of international law is now in order precisely because

¹ For this he cited H. Patrick Glenn, *Legal Traditions of the World* (5th ed.; 2014).

other parts of the globe are able to produce authoritative accounts of their own past and their engagement in the regional or global segments of the planet which they inhabit. He rightly acknowledges the *Journal of the History of International Law* founded by Ronald St. J. Macdonald, but seems not to know the present Journal.

Chapter 3 (Mark Somos) addresses “Political Thought and the Historiography of International Law”. In what is a seminal essay, he cautions against over-extending identifications of “political subtext” in earlier histories of international law, but notes the powerful theological influences present in some historical accounts and the possible continuation of these in later ostensibly secular accounts. He concludes that three findings “nuance the relationship between political thought and the historiography of international law”: the “return of religion”; the “urgent and direct effect” of nineteenth and twentieth century politics on the inclination of rivals to ascribe the origins of international law in the sixteenth century to Spain or to seventeenth century Holland; and the writings of Vattel and others have set standards that can be helpful in building modern historiographies.

In a co-authored Chapter 4 (Giovanni Mantilla and Carsten-Andreas Schulz) the continuing “turn” to the history of international law by international relations specialists is perceived as a consequence of two developments. Internally, so to speak, international relations specialists are more comfortable with “historically-grounded” narratives than in the past. Externally, the internationally relations specialists have become more interdisciplinary and conversant with the thinking of neighboring intellectual and global history and international law. The real question for historians of international law and relations is whether and when international law enters directly into foreign policy formulation and execution and what evidence there exists of such happening. This was beyond the concept of Chapter 4.

Christopher Casey in Chapter 5 considers “Economic History and International Law: A Peculiar Absence”. He finds that economic historians “have not had much to say about international law’s impact on the economy”. That conclusion comes as something as a surprise: one would expect the international legal regulation of slavery to fall in this purview, as well as the negotiations of treaties of friendship and commerce, or treaties regulating war contraband. If the author is correct, an immense research space is available.

Two useful chapters seem to have been omitted or overlooked: “Comparative International Law”, which would underlie Part Two of this volume, and a chapter on the language and vocabulary of international law, central to its dispersal about the planet.

Part Two of this volume the “Historiography of International Law Regional Traditions”. Chapters 6 to 12 address consecutively East Asia (Keun-Gwan Lee); Sub-Saharan Africa (Inge van Hulle); European Continent (Frederik Dhondt); Russia and its Successor States (Lauri Mälksoo); the United Kingdom (David Armitage and Ignacio de la Rasilla); United States (John Witt); and Latin America (Arnulf Becker Lorca). Well-known specialists all, but I shall concentrate on my own specialty covered here by my friend and colleague, Professor Mälksoo.

He begins his Chapter 9 with some thoughtful remarks about why one might engage in the history of international law and dates that pastime in Russia to the appearance of the Petr Pavlovich Shafirov (1673-1739), *Discourse* on the reasons for which Peter the Great attacked Sweden to initiate the Great Northern War, which ultimately lasted over two decades. A keyboard error occurred here (we used to call them slips of the pen). In footnote 1 the author says: “The Russian original was written in 1716 but published only after the end of the war, in 1722” (p. 272). Not so, I can say with authority, since I wrote the introduction to the facsimile reproduction of the Russian original published in 1717 which Professor Mälksoo is citing; the 1722 date was confused in the footnote with the previously unidentified English translation of the said *Discourse* published at London in 1722. The translation, previously unknown, was the occasion for my book at the time; the Russian original was published in 1717.

Following Shafirov, the author then turns to F. F. Martens as the next serious Russian historian of international law almost 150 years later, That is unfair to some other intervening personalities, including Gerhard-Friedrich Müller (1705-1783), Nikolai Nikolaevich Bantysh-Kamenskii (1737-1814), Count Nikolai Petrovich Rumiantsev (1754-1826), and Dmitrii Ivanovich Bantysh-Kamenskii (1829-1912) but a discussion best reserved for elsewhere. The author gives a good account of how Martens used the historical method and his integration of archival research and

unrivalled command of Russian treaties, but overlooks the recent English translation of the seminal Martens treatise.²

He then turns to Martens' protégé, Baron Mikhail Aleksandrovich von Taube (1869-1961), who began but never completed something of a universal history of the law of nations, Euro-centric but with flashes of Byzantine and Central European experience missing in other western histories. Central European international lawyers are awake to the neglect of their role in international legal history and have invented SWAIL in Spring 2025 to rectify the issue. We shall see.

A particular strength of this Chapter is the attention given to the Hrabar/Durdenevskii co-authorship of the lengthy history chapter (pp. 35-108) and the treatment of the early history of international law in the 1947 textbook on international law (first Soviet textbook after the unfortunate Pashukanis effort of 1935 and the first of the post-World War II era). Grabar was a world recognized specialist on the early medieval period. His history of international law in Russia, commissioned by the Imperial Russian Academy of Sciences in 1914, was completed and at the press in 1940 but delayed by wartime circumstances. At the time in the Soviet Union, issues of pre-State law bedeviled both international law and comparative legal studies of customary tribal law because the classical Marxist view was that law did not and could not exist prior to the emergence of States (which led to the assertion by Hrabar/Durdenevskii that States existed as early as 3000 BC). With respect to international law, we know that Grabar resisted that view, and also resisted exaggerations of the Russian role in international legal development and unjustified triumphant assertions about Russian contributions. He was cautioned at least once that unless he changed his view, his treatise on the history of international law in Russia would never be published:

When the question was discussed of printing his "Materials on the History of the Literature of International Law in Russia", they required that the beginning of the book be changed where foreign works were mentioned (Pufendorf and others) which influenced the birth of Russian creative autonomous international legal literature. Grabar refused to

² F. F. Martens, *Contemporary International Law of Civilized Peoples*, ed. and transl. W. E. Butler (2021-2022). 2 vols.

do this, although the then Director of the Institute of Law of the USSR Academy of Sciences, E. A. Korovin, cautioned Grabar that if the last refused to confirm the primordial originality of the Russian science of international law, his work of many years would not see the light of day.³

And, indeed, that proved to be the case. His treatise appeared first in 1958, two years after this death. The early chapters showed signs of being meddled with, but his persistence and insistence prevailed.

The review of late and post-Soviet writings ties up the chapter with excellent insights into the few and slender monographs produced, each in its own way criticizing the Euro-centric focus of western writing but not based on original research in the form of documentation or advancing knowledge of the subject-matter. As so much modern western scholarship, a rehash of earlier work with some revised interpretations but no real new scholarship even from a Marxian perspective.

Mälksoo is persuasive in his conclusions: that Russian work is likely to emphasize regionalism (and for good reason). The structure of his chapter, I suspect, follows the guidelines he was given for the Series and draws almost entirely upon his earlier publications and interpretations.

I would have handled the material differently. The centerpiece of Russian original international legal historiography is Grabar. The personal archives of Grabar, located in the Tartu University Library and a stone's throw from Mälksoo's law faculty, disclose the existence of a true international legal historian whose unrealized objective was a world history of the law of nations. Much of the archive consists of outlines, notes, and thousands of bibliographic references, many or most of them recorded on tiny scraps of paper. This was an undertaking never to be realized under Soviet conditions

³ See Aleksandr Mikhailovich Ladyzhenskii, «Глава 24. ТАЛАНТЛИВЫЙ ТРУДОЛЮБЕЦ (К столетию со дня рождения В. Э. Грабаря)» [Chapter 24. Talented Hard-Worker (On One Hundred Years from the Birth of V. E. Grabar)], *Воспоминания и размышления* [Recollections and Reflections]. Unpublished autobiography of A. M. Ladyzhenskii (1891-1972). НИОР РГБ. Ф. 743. Картон 16. Д. 6. I am obliged to Professor Konstantin Krakovskii for drawing this material to my attention. Ladyzhenskii probably wrote this Chapter ca. 1965.

not conducive to its completion. Grabar even reached out to James Brown Scott at the Carnegie Endowment to volunteer his services to the Classics of International Law Project in 1923. His initiative was rejected, although its acceptance would have had profound implications and consequences for the history of international legal scholarship and probably for the Series itself. Grabar is the only true historian of international law in Russia whose published and unpublished work displays the creativity of an historian who had a masterly command of the relevant issues prominent in his day.

His work on the history of international law in Russia was a secondary project for him, an assignment of the Imperial Russian Academy of Sciences dating from 1914 and completed by 1940. A substantial History in its posthumous 1958 and 2005 Russian language versions (the 2005 edition edited by myself and introduced by V. A. Tomsiniov) and my English translation (1990), no other country has a comparable work delving into the persona and doctrinal or documentary studies (what Grabar called the “history of the literature” of international law in Russia). This is indispensable foundation work without which much of the historical work elsewhere is piecemeal and fragmentary. And it is a sample of what might have been done on a global scale. Whether one evaluates Grabar from the standpoint of what might have been or what actually was published, he remains without peer as a true historian of international law in Russia.

The Martens treatise on the contemporary international law of civilized peoples, insofar as the history of international law is concerned, offered little to the discipline at large, but introduced the Russian reader to some of the mainstream, primarily western European and American (Wheaton), works; Martens was in fact an accomplished scholar of Russian State practice by virtue of his fifteen-volume treaty series assigned to his editorship by the Russian Ministry of Foreign Affairs and, just as Grabar’s world history of international law – uncompleted to this day. The treaty series is a collection of documentary primary source materials with commentary, foundation materials for the later true historian.

The successors (pupils) of Martens – Taube and Boris Nolde – produced useful works based primarily on European histories, but offered little original research.

As for the Soviet period, except for Grabar none of the individuals mentioned by Mälksoo did anything other than critique predecessor scholarship from a Marxist-Leninist point of view or

massage some of the earlier legal scholarship; very little product of archival origin. The exception is Starodubtsev, whose contributions remain under-appreciated.

The Butler/Ivanenko work on the St. Petersburg School of International Law came to Mälksoo late and is merely mentioned. He does not see, for better or worse, how that work builds on the original Grabar and seeks to take at least the capital city's contribution to the law of nations to a different level by visiting the archives for the first time (what Grabar could not do) and materially enlarging the account of the literature of international law and the individuals responsible. The same kind of project needs to be undertaken for all other countries.

The global analytical template of regionalism as one comprehensive perspective on the comparative development of the law of nations is promising indeed – one sure to provide new insights and, one hopes, something more than a mere massaging of the existing literature, and one which draws upon the rich experience of comparative national law and its methodologies in the process.

An original contribution to the history of the law of nations of an entirely different standard is Martine Julia van Ittersum, *The Working Papers of Hugo Grotius*, cleverly timed to coincide with the 400th anniversary the publication of Grotius, *De jure belli ac pacem* (1625) but buried in the Brill Series in Intellectual History 344, deftly edited by Han van Ruler. Perhaps Brill will cross-market the title to reach international lawyers as well as intellectual historians.

This is manuscript and book history at its best, a formidable detective story which traces and reconstructs the transmission, dispersal, and loss of Hugo Grotius' manuscripts, artifacts, and personal library during his lifetime (imprisonment, escape, exile, diplomatic appointments, shipwreck) and thereafter. The author estimates that more than 10,000 folios of Grotius material today are represented in institutional collections, and an untold number in private hands. That any survive at all is thanks to their holders realizing the importance and value (not always) thereof; the ultimate dispersal came in 1864 at an auction organized by Martinus Nijhoff on behalf of a consignor determined to satisfy personal indebtedness and turn something of a profit – an objective duly achieved. In her concluding chapter the author compares the sales of Grotius material with those of Isaac Newton – two of the greatest polymaths in human history. The parallels are revealing in the comparative

lack of market interest and the astute institutional acquisitions of some of the lots. This is legal and historical scholarship of the first water in a volume attractively produced if not robustly bound, with color illustrations distributed in frequency throughout the text and more sensitively selected than those view bunched together in black and white in the Cambridge History. Actually, welcome bedside reading.

No less absorbing is Kaj Hobér on recent international legal history. For him, [t]his book is about history, history of international law ... a relatively short period – 1985-1991 – ... probably the most eventful and dramatic period in modern history” (p. 18). The perestroika era leading to the dissolution of the former Soviet Union represents the “... last part of a chronological period, which started in 1917” (ibid.). Chapter 3 of this volume is thus devoted to the “History of international law” and to issues of periodization raised by the perestroika era. The author is no mere passive observer; he was an actor, a player, in these processes; neither is this a memoir (promised perhaps in another volume, and eagerly awaited). Looking back, he sees the enduring importance of what perestroika brought. Following introductory chapters outlining the concept of perestroika and the Gorbachev reforms, the author turns to the “new thinking” introduced in perestroika and its significance for international law and foreign policy. Specific applications of the “new thinking” are then examined in the context of sources of international law (with greater acceptance of customary international law), the legal foundations of peaceful coexistence, the use of force, border disputes (with excellent material on the USSR-Swedish frontier agreements and useful background on the US-USSR maritime agreement, alas never ratified by the USSR or the Russian Federation), human rights, foreign economic relations, and the legal events culminating in the legal dissolution of the USSR, which perhaps might have invited a lengthier discussion by the author of the differences between the legal continuation and legal succession of the Independent States.

An excellent volume, accompanied by eleven informative documentary appendices, which one hopes will be followed by analyses and/or recollections of other insiders.

Contents

ARTICLES

- Interdisciplinarity and the Limits of Writing "Peripheral"
International Legal Histories *Jakob Zollmann*
- The Life and Fate of Aleksandr Mikhailovich Ladyzhenskii *Konstantin P. Krakovskii*
- Legal Perspectives from *The Independence*: Tracing Korea's Path
in International Law *Diane Hong*

NOTES

- Grotius and Vattel in Russian: New Developments *William E. Butler*
- On the Glory of Conquerors, Peter the Great [and] Charles XII *Emer de Vattel*
- The Legality of the Soviet Annexation of the Baltic States *Evgeny Tikhonravov*

DOCUMENTS AND OTHER EVIDENCE OF STATE PRACTICE

- A Brief Calendar of State Practice for Shandong: 1897–1924
Part Nine (1919): More Scraps of Paper *Peter Macalister-Smith*
Joachim Schwietzke

REVIEW ARTICLE

- International Legal History, Grotian Studies, and Perestroika *William E. Butler*

IN MEMORIAM

- Vitalii Semenovich Ivanenko (1946–2024) *William E. Butler*

FROM THE LITERATURE

ISSN: 2381-0254 (Print)
ISSN: 2381-0262 (Online)

SKU: 2370002017626



2 370002 017626

TALBOT
PUBLISHING
www.lawbookexchange.com

Cover design by Peter Lo Ricco