Wilhelm G. Grewe

died on 11 January 2000 at the age of almost 89. He combined the careers of a scholar concentrating particularly on the history of public international law and of a diplomat who was very influential during the formative years of the Federal Republic of Germany when German foreign policy and Deutschlandpolitik were shaped.

He was for a short time head of the legal division in the recently founded Foreign Office and then head of the political section. In 1958 he became ambassador to the United States and was German ambassador to NATO from 1962 until 1971. He ended his diplomatic career as ambassador to Japan.

After his retirement Wilhelm Grewe finalised the book which he had written as a young researcher during the Second World War in Berlin. This was the basis for his Habilitation in Königsberg (now Kaliningrad) in 1941. The book was printed during the war but destroyed by bombs.

It is an indication of Grewe's attitude that it was not necessary for him to change the structure and content of a book on the history of public international law in any important manner. Indeed, Wilhelm Grewe had abstained from mixing in politics in any way during the Nazi period.

I am very happy that I could propose Michael Byers, who had done research at our Institute several times, as the native speaker to do the translation of Grewe's *Epochs of International Law*. I am sure that the book will make history in the English speaking world.

Heidelberg
February 2000

Jochen Abr. Frowein

Wilhelm G. Grewe

The Epochs of International Law

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Translated and revised by Michael Byers

Walter de Gruyter • Berlin • New York 2000

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Revised translation of Wilhelm G. Grewe's »Epochen der Völkergeschichte«, published in 1984 by Nomos Verlagsgesellschaft, Baden-Baden.

The publication of the work was subsidized by a grant from INTER NATIONES, Bonn.

♾ Printed on acid-free paper which falls within the guidelines of the ANSI to ensure permanence and durability.

Library of Congress Cataloging-in-Publication Data

Grewe, Wilhelm Georg, 1911-
[Epochen der Völkerrechtsgeschichte. English]
The epochs of international law / Wilhelm G. Grewe; translated and revised by Michael Byers.
p. cm.
Includes bibliographical references and indexes.
ISBN 3110153394 (alk. paper)
1. International law--History. I. Title.

KZ1242. G7413 2000
341'.09--dc21 00-035881

Die Deutsche Bibliothek – CIP-Einheitsaufnahme

Grewe, Wilhelm G.:
The epochs of international law / Wilhelm G. Grewe. Transl. and rev. by Michael Byers. - Berlin ; New York : de Gruyter, 2000
Einheitssacht.: Epochen der Völkerrechtsgeschichte <engl.>
ISBN 3-11-015339-4

Printed in Germany
Data Conversion: Uwe Friedrich, Berlin
Cover Design: Christopher Schneider, Berlin
Printing and Binding: Hubert & Co., Göttingen

Preface

One hesitates in presenting a book for the third time, to provide it with a third preface. But there are some special reasons that seem to justify this decision. After all, it is not normal for a book to be published forty years after the conclusion of the manuscript, after two perfect but futile printings, and then to be translated another 15 years later. Thus it happens that this book has developed through the course of three consecutive but different epochs of international law.

Readers who expect an edition revised and fully updated in accordance with the standards of 1999 may be disappointed that the author could not satisfy such expectations. I was simply too old for shouldering the burdens of such a demanding task. The second German edition (of 1984) was not a new edition. Nor is the present English text a new edition. Only a minimal number of modifications and additions have been made.

In the preface to the 1984 edition I mentioned the elimination of a timetable and documentary section, and promised a separate compilation of documents, to be published later. This promise has been fulfilled by the publication, between 1988 and 1995, of three volumes of *Fontes Historiae Iuris Gentium*. This documentation should be regarded as complimentary to The Epochs of International Law. Both works, the English version of the Epochs and the Fontes are being produced by the same publishing house, Walter de Gruyter, Berlin. I wish to express my thanks to its representative Dr Dorothee Walther. Her personal commitment, her energy and her interest in the subject matter constituted a most valuable contribution to the coming into being of both publications.

Once I begin to open up the list of gratitudes I must mention Michael Byers, who reworked the text linguistically. He also assisted me with valuable advice as to the substance.

Lastly, I wish to thank Ute Meier. In practical matters, she was the backbone of my working process.

Königswinter-Thomasberg
December 1999

Wilhelm G. Grewe

Translator's Note

This translation and partial update of Wilhelm Grewe's *Epochen der Völkerrechtsgeschichte* seeks to make this classic work easily accessible to those students, scholars and practitioners of international law and international relations who do not read German well. It remains largely faithful to the original text and original citations, in the belief that the reader should feel the full force of Grewe's personal perspective – and be able to appreciate fully the wealth of German language literature on the history of international law.

That said, a number of minor revisions have been made, including the addition of an epilogue, which was completed in October 1998. All of these changes were approved by Professor Grewe himself, who served as my editor. I am grateful for his careful and good-humoured assistance, as well as for the kind hospitality that he and his wife provided during my numerous visits to their home in Königswinter.

I also wish to express my thanks to Jochen Frowein and the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. Professor Frowein was instrumental in bringing me to this project and in providing the quiet yet invigorating environment in which most of the work was done.

Anne Denise provided essential assistance during the early stages of this project when I was still developing my translating skills, while Frances Nicholson reviewed the final text and made innumerable suggestions as to how my English could be improved. I am also grateful to Amgana Sengupta for her help with the indexing. Any mistakes which remain are mine and mine alone.

Last but not least, I am grateful to Peter Haggenmacher for having provided advice and cautious encouragement when I was contemplating taking this project on. I can only hope that my translation comes close to meeting his own demanding standards.

Durham, N.C.
January 2000

Michael Byers

Preface to the Second Edition

It will be evident from the preface of 1944 that this book is now being published for the third time. The first two printings of 1943 and 1945 were never completed, though the corrected page proofs were finished in early 1945. The reason for this is obvious: it was already a wonder that the production process for such a book could continue into the last months of war. Some of the page proofs are dated from February 1945, and at this point it was simply not possible to think of printing and distribition. When, after the war, the Leipzig publishing house Koehler & Amelang was licenced by the Soviet military administration and could resume ist activities, it was stipulated that a publication was now only possible under certain conditions which I was not prepared to accept. It had already been a remarkable accomplishment to avoid any alteration of the text by the censor during the Third Reich. I did not dare to make such an effort again, especially from the distance of the Western zones. By the time the publishing house moved to the West a few years later, I was so involved in other duties - in the Foreign Service, including many years abroad - that I could find no time to devote to the editing of the nearly completed book (although I did provide a few colleagues and libraries with bound copies of the page proofs).

In this way, forty years elapsed since the completion of the first manuscript. After such a space of time, it was only possible to publish after fundamentally reworking and extending a presentation that had stretched only to 1939. I have been able to take up this task during the past few years thanks in large part to the generous support provided by the Thyssen Foundation. I am most grateful to those individuals and committees who were responsible for making this award. I also wish to thank the Max Planck Institute for Comparative Public Law and International Law in Heidelberg and its directors for their constant support. I am grateful above all to Ms Hannelore Wermke who was a great assistance to me in finding and obtaining of literature as well as with corrections and technical work. I thank my wife, Gerty, for her advice, and her assistance with the translation and understanding of Spanish texts.

In order to prevent the book from becoming extensively thick, I have removed the document section and one time chart. I hope to produce a document collection on the history of international law at a later point.

For the same reason, I have sought to keep brief the newly written Part Six which covers the period beginning 1945. This seems to me all the more justified given that this part inevitably overlaps with systematic presentations of contemporary international law, of which there is no shortage.

Bonn
31 March 1984

W.G.G.

Preface to the First Edition

This book was written during the war. Begun in the winter 1939/40, it was finished in Berlin during the heavy air raids of August and September 1943. The page proofs arrived as the library was being either closed or moved. On 4 December 1943, the partially set type was destroyed in an air raid on Leipzig. Other difficulties caused by the war also left their traces. A few citations remain incomplete and a few sources have not been checked - either because they could not be obtained, or because they could not be obtained in time. This is an inevitable aspect of books written during such a period.

The decision to complete and publish the book in wartime was motivated, above all, by the strongly felt need - experienced while teaching - for a book that would take students through the character and structure of international law from a historical perspective. At a time when the traditional system of international law is shaken to its foundations, access to the remaining structural principles of the international legal order can only be provided on historical grounds. This book takes on this task and from this perspective has a definite structure: it seeks to educate not only experts, but also beginners, and to provide a truly useful and readily accessible resource for both groups. This is the reason for the general historical overviews at the beginning of each section, the generous provision of dates and biographical detail, the wide-reaching appendixes with documents, biographies, time charts and extensive indexes.

With this objective in mind, the aim was not to offer a full history of all international legal institutions. Instead, one seeks to make visible the spirit, the structural principles, and the development of the international legal order. Therein, however, the pedagogical and the purely scientific interests of the author meet - and thus he hopes that the experts will also benefit from this book. The history of the institutions of international law still requires protracted, meticulous individual research. Perhaps the author has succeeded in contributing a few building blocks here. His true endeavor, however, is directed not at the details, but rather at the entirety of the history of international law: the sequence of the epochs and the structure of its now generally accepted system of order. Here above all is how he wishes to perceive the scientific result of his work.

The delay in printing and other circumstances induced me initially to publish my most important results in summary form within the *Zeitschrift für die gesamte Staatswissenschaft* (Vol. 103 No. 1, pp. 38-66, No. 2 pp. 260-294). What I could only sketch out there, I now hope to develop in detail. The medieval foundations of modern international law could not be presented within that summary. They were sketched out in an article entitled »Res publica christiana. Vom Wesen der mittelalterlichen Völkerrechtsordnung,« which was published in the *Europäische Revue* (Vol. 16, No. 10, October 1940, pp. 594-600). That article was very much a preliminary work and the main aspects have now been expanded upon in Part One of this

book. Thus, the points of departure developed within the first part are set out for the first time.

In March 1941 a portion of this book was accepted by the Law and Political Science Faculty of Albertus University in Königsberg (Prussia) as a »Habilitationsschrift« (i.e. second doctoral thesis).

I would like to thank my wife for her stylistic assistance. For corrections and the preparation of the index I relied, in particular, on my assistant Ms A. Regelin. Not least, however, I owe my thanks to Dr Hellmut Köster, who on behalf of the publisher was untiring in his efforts to bring this book into being, paying attention not only to its content, but also its presentation.

Berlin-Zehlendorf
20 November 1944

Wilhelm G. Grewe

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Introduction

I. The Periodisation of the History of International Law

This book does not claim to set out in a systematic manner either the history of international law or the epochs of that history. Yet the title »The Epochs of International Law« is a carefully chosen one. This book does not deal at all with one important and only slightly explored period in the history of international law, namely the international law of antiquity. It deals with another, no less important and only slightly more explored period – the international legal order of the Middle Ages – only in outline and only in so far as is necessary for an understanding of the development of modern international law.

At the time the author wrote this book he felt that he was not competent or capable of filling in the gaps and attacking the large problems which, in retrospect, still exist in the literature of international law with respect to these two extensive periods.

His starting point was the history of modern international law, and his endeavour not so much the systematic presentation of that history as its morphological division, its periodisation, and the development of a system of typological concepts. This task has been seriously neglected in the study of international law up to the present day, in contrast to the situation in which those who study politics and constitutions find themselves. They have a comprehensive arsenal of sophisticated typological categories available to them. There is consequently little confusion amongst them as to what constitutes a »sovereign principality«, a »constitutional monarchy«, or a »civil State under the rule of law«. In the study of constitutional history the problem of periodisation has been perceived and thought through, with lasting results. By contrast, the establishment of typological concepts in international law is still so underdeveloped that, when one speaks of »classical international law«, one can by no means be certain of being properly understood.

In the author's view, the problem of periodisation in the history of international law (periodisation and typology being problems that, in the area of international law, naturally and frequently arise together) is a problem which until now has either not been discussed at all or, if it has been discussed, has only been discussed in a very summary fashion. In 1923 the English international lawyer Sir Paul Vinogradoff gave a lecture at the University of Leiden entitled »Historical Types of International Law«, which was published in the Bibliotheca Visseriana. He distinguished what were in his opinion five fundamental forms of social organisation – tribes, cities, churches, contractual societies, collective organisations – and argued that specific forms of international interaction and organisation should be assigned into one or other of these categories. It was only on the loosely defined basis of these fundamental types that he then considered different epochs in

the history of international law: the age of the Greek city-States; the *ius gentium* of the Romans; the empire of medieval Christendom; the international relations of the early modern territorial States; and the development of an organised society of nations. Quite apart from the question of whether one considers these periods to be suitable intellectual starting points, it is still obvious that Vinogradoff's scheme is only a very rudimentary one which cannot elucidate all the materials on the history of international law. At best, it is only a framework within which further investigations may be conducted.

The book published by Sir Geoffrey Butler and Simon Maccoby in 1928 and entitled *The Development of International Law* offered a wealth of material. Yet despite its division into three parts, designated »The Age of the Prince«, »The Age of the Judge« and »The Age of the Concert«, it did not actually engage in a complete periodisation of the history of international law. Instead, it focused on setting out the sequence in which individual principles of international law appeared. The same was true of Arthur Wegner's *Geschichte des Völkerrechts* (The History of the Law of Nations) (1936), which did not sub-divide its extensive materials into definite, characteristic epochs. It is true that C. van Vollenhoven's book *De iure pacis* (The Law of Peace) (1932) attempted a kind of periodisation of the history of international law. However, this periodisation was not based on the structure of the international legal order as a whole. Rather, it was rooted in a narrow, dogmatic pacifism which measured all the historical events and figures of international law on the basis of the same criterion, that is, whether they served the purposes of outlawing war and safeguarding the peace in accordance with the methods propounded by the League of Nations, which had meantime proved problematic.

Numerous authors examining the history of the law of nations adopted a peculiar and methodologically questionable separation of theory and State practice. In doing so they were placing themselves at a disadvantage, as such a separation does not concern two divided branches of the history of the law of nations, but rather only two sides of the same process. On the one hand, they lost themselves in an abstract history of the theory, which could not acknowledge the concrete intellectual historical position of a Vitoria, a Gentili or a Grotius, nor the concrete political and sociological background to their theories. On the other hand, inter-State relations were regarded as a bare array of facts to be grasped and systematised by way of a theoretically-derived, abstract intellectual method. A nascent structural ordering of this array of facts was thus overlooked.

This book will not review individually each of the many treatises that adopted this separation of theory and practice in their introductory historical sections. As a characteristic example one need mention only the description of the history of the law of nations which is found in Holtzendorff and Rivier's *Handbuch des Völkerrechts* (Handbook of the Law of Nations) (Volume I, 1885). This description was comprised of two parts, each of which was written by a different author. Holtzendorff wrote on *Die geschichtliche Entwicklung der internationalen Rechts- und Staatsbeziehungen bis zum Westfälischen Frieden* (The Historical Development of the Law of

Nations and State Relations up to the Peace of Westphalia). Rivier, on the other hand, contributed in the form of a *Literarhistorische Übersicht der Systeme und Theorien des Völkerrechts seit Grotius* (Historical-Literary Overview of the System and Theory of the Law of Nations since Grotius). This division of labour, which allowed pre-Grotius theory and post-Peace of Westphalia practice to fall by the wayside, is by its nature particularly unsatisfactory, for the quality of the separate examinations could not in any way be verified. The same criticism may be made of the wide-ranging book by R. Redslob, *Histoire des grands principes du droit des gens* (The history of the major principles of the law of nations) (1923), in which each discussion of a particular time period is divided into »les faits« (the facts) and »les auteurs« (the authors).[1]

In this respect the literature on the history of international law has gradually improved since the end of the Second World War. Arthur Nussbaum's *Concise History of the Law of Nations*, which was published in 1947, adopted essentially the same periodisation as this book. Nussbaum nevertheless then rejected the definition of characteristic features of individual epochs of international law and the assignation of names to those epochs to identify their character.[2] Although his footnotes dealt alternatively with principles and theories of international law, there was no clear relationship between them.

Georg Stadtmüller's short *Geschichte des Völkerrechts* (The History of the Law of Nations) (1951) remained unfinished after one volume. Although the book's structure was rendered unclear by numerous asides, Stadtmüller, a professional historian, was more successful than most of his legal predecessors in combining a consideration of the history of the principles of international law with a consideration of the history of its theory. He essentially followed a conception of periodisation which I had advanced in 1942.[3] Two consecutive chapters of his book concern the »Herausbildung des spanischen Völkerrechts« (The Origins of the Spanish Law of Nations) (Chapter 16) and the »Das Goldene Jahrhundert« (The Golden century) of Spanish

1 Older presentations of the history of international law are equally unhelpful with respect to the problem of periodisation. See, e.g.: Robert Ward, *An Enquiry into the Foundations and History of the Law of Nations*, 2 Vols. (1795); and F. Laurent, *Histoire du droit des gens et des relations internationales*, Vols. 1-14 (1850-61). Thomas Alfred Walker, *A History of the Law of Nations* (1899) only produced the first volume of this book, concluding with the Peace of Westphalia. John Hosack's *On the Rise and Growth of the Law of Nations* (1882) ended at the Peace of Utrecht and can in any case not be considered as a history of international law as it dealt only with the legally relevant facts of diplomatic history. Ernest Nys published a compilation of his writings on the history of international law (*Les origines du droit international*) in 1894, each of which is in itself extremely valuable. Yet the compliation does not succeed in providing a complete picture.

2 Nussbaum's chapter headings were as follows: I. Antiquity; II. The Middle Ages (in the West); III. The Middle Ages (in the East); IV. The Modern Age up to the Thirty Years War; V. From the Peace of Westphalia to the Napoleonic Wars; VI. From the Congress of Vienna to World War I; VII. From the Versailles Treaty to World War II.

3 (1942) 103 Zeitschrift für die gesamte Staatswissenschaft 38-66 & 260-94.

domination (Chapter 17). A later chapter is about the »Das Zeitalter der französischen Vorherrschaft« (The Age of French Supremacy), 1635-1789 (Chapter 20). The second volume, although never finished, was intended to deal with the history of international law in the nineteenth century, from the Congress of Vienna to the Hague Peace Conference of 1907.[4]

Two volumes entitled *Völkerrecht* (The Law of Nations), published by Ernst Reibstein between 1958 and 1963, were identified by their sub-title as being *Eine Geschichte seiner Ideen in Lehre und Praxis* (A History of its Ideas in Doctrine and Practice).[5] Despite providing a rich compilation of ideas, materials and careful documentation (throughout which the views of the author nevertheless remain apparent), this work is unhelpful with respect to the problem of the periodisation of the history of international law.

Wolfgang Preiser, who has contributed numerous monographs concerning various historical periods to the study of the history of the law of nations,[6] is also owed thanks for two concise overviews of the full history of the subject. In both of these overviews he explicitly agreed with and followed my proposals concerning periodisation.[7] In his contribution on »Völkerrechtsgeschichte« (The History of the Law of Nations) to the Evangelischen Staatslexikon,[8] Preiser, after dealing only sketchily with the development of

4 The author thus cut short the beginning and the end of this time period in a manner which is difficult to understand: the Congress of Vienna formed the conclusion of Volume 1 (rather than the beginning of Volume 2); and Volume 2 ought not to have ended with the Hague Conference of 1907, but rather with the First World War. To adopt an expanded periodisation along these lines would certainly not be to create a secular break.

5 Two introductory chapters entitled »Vom Altertum zum Mittelalter« (From Antiquity to the Middle Ages) (I) and »Respublica Christiana: Die Universalmonarchie« (The Christian Republic: The Universal Monarchy) (II) are followed by two chapters on »Die Völkerrechtsklassiker und ihre Epoche« (The Classical Scholars of International Law and their Epoch) (III) and »Die Aufklärung und die Spätklassiker« (The Enlightenment and the Late Classical Scholars of International Law) (IV). Authors since Pufendorf, and therefore since the end of the seventeenth century, are included in the late classical period. Volume 2, which is summarily sub-titled »Die letzten zweihundert Jahre« (The Last Two Hundred Years), concerns various selected problems running through the history of international law. However, the structure of Volume 1 makes it clear that the author has, for the most part, written yet another history of the ideas, the system, and the theory of international law. Indeed, although the principles and practice of the law of nations are dealt with in his consideration of the »classical epoch«, they are neglected in his consideration of the subsequent epoch of the »enlightenment«.

6 See bibliography, *infra*.

7 For Preiser's views on the concept of the »Spanish Age« see: *Wörterbuch des Völkerrechts*, Vol. 3, p. 696. For his evaluation of my periodisation as »methodisch wichtig« (methodologically important), »methodisch vorbildlich« (methodologically exemplary), and »to me the most compelling periodisation of modern times«, see: »Die Völkerrechtsgeschichte, Ihre Aufgabe und Methode«, (1963) 2(2) Sitzungsber. d. wiss. Gesellschaft a.d. Johann Goethe-Univ. p. 43, fn. 1, p. 66, fn. 2; (1955-56) 5 Archiv des Völkerrechts 233.

8 Preiser, »Völkerrechts-Geschichte«, in H. Kunst et al., *Evangelisches Staatslexikon* (2nd edn.), 1975, pp. 2823-26.

this law in Antiquity, concerned himself with the transition period between Antiquity (400-800) and the early (800-1300) and high (1300-1500) Middle Ages, and with modern times (1500-1914) under the subheadings »Spanisches Zeitalter« (The Spanish Age) (1500-1648), »Französisches Zeitalter« (The French Age) (1648-1815), and »Englisches Zeitalter« (The English Age) (1815-1914). A concluding section dealt with the »Neueste Zeit (seit 1914)« (the Most Recent Times (since 1914)). The same structure provided the foundation for Preiser's contribution on »Völkerrechtsgeschichte« (The History of the Law of Nations) to the *Wörterbuch des Völkerrechts und der Diplomatie* (Dictionary of International Law and Diplomacy) (1962). Preiser's section was a rich account of the subject up to the Peace of Westphalia. Subsequent periods were dealt with by Ernst Reibstein, Hans Ulrich Scupin and Ulrich Scheuner, who adopted the same divisions of the various time periods. Reibstein covered the period from 1648 to 1815 as »Europäisches Völkerrecht« (European Law of Nations) and dealt with the idea and the expansion of the »Droit public de l'Europe« (The public law of Europe); Scupin wrote about the period from 1815 to 1914 as the »Erweiterung des europäischen Völkerrechts« (The extension of the European law of nations); while Scheuner abstained from making a characterisation with respect to the content of the »neuesten Entwicklungen« (most recent developments).

In 1978 Stephen Verosta published, under the thematic title »Regionen und Perioden der Geschichte des Völkerrechts« (Regions and Periods of the History of International Law),[9] an assessment of Bruno Paradisi's *Civitas maxima, Studi di Storia del Diritto Internazionale* (Civitas maxima, Studies on the History of International Law).[10] Beginning with Paradisi, who had a particular interest in the transition period from Antiquity to the early Middle Ages, Verosta outlined his own divisional scheme for a world history of the law of nations, as he had done in his concise sketch of its complete history in the textbook edited by Alfred Verdross.[11]

Verosta's conception of divisions is much broader than the one which underlies this book. It combines a survey of the broad regions within which the historical development of international law occurred (Western Asia/Middle East, the Mediterranean, Europe, the Islamic family of nations, the Indian States, East Asia) with an account of the historical sequence of developments in international law in these regions. In the Mediterranean these comprised the Greek city-States and the Persian Empire; the Hellenistic States and the Roman Republic; the Roman Empire, the Persian Empire and the »barbarians«. In Europe they comprised the mass migration of Germanic tribes and western »Romania« (the realm of peoples speaking romance languages); the two Roman Empires of Christendom; the occiden-

9 Verosta, »Regionen und Perioden der Geschichte des Völkerrechts«, (1979) 30 Österr. Zeitschrift für öffentliches Recht 1. See also: Verosta, in *Encyclopedia of Public International Law*, Vol. 7, p. 160 ff.

10 Paradisi, *Civitas Maxima, Studi di Storia del Diritto internazionale*, 2 Vols., 1974.

11 Verosta, »Die Geschichte des Völkerrechts«, in Verdross, *Völkerrecht* (5th edn.), 1964, pp. 31-94.

tal Res publica Christiana; the Eastern Roman State community and the orthodox successor States of Byzantium; the European State system and classical law of nations; and international law after the American, French and industrial revolutions. Each survey led finally to the world State system and its universal international law.[12]

The full extent of Verosta's conception is not discussed here. It will engage historians of international law as soon as they venture towards a universal history of the subject. In this book it is sufficient to note that Verosta too, when dealing with modern times, dedicated a portion of his contribution to Verdross' textbook to a »Periode der Vorherrschaft Spaniens« (Period of Spanish Domination) which ended with the Peace of the Pyrenees in 1659, another portion to the succeeding »Zeitraum des Hegemoniestrebens Frankreichs (1648-1815)« (Period of French Struggle for Hegemony), followed by a final portion on »Völkerrecht nach der amerikanischen, französischen und industriellen Revolutionen« (International Law after the American, French and Industrial Revolutions). During this latter period »England seit Trafalgar (1805)« (England since Trafalgar (1805)), is seen as being »die Vormacht zur See« (the principal naval power).[13]

In order to conclude this survey it should be noted that a recent textbook on the history of international law also agrees with the definition of periods suggested here. This textbook is Karl-Heinz Ziegler's *Völkerrechtsgeschichte* (The History of International Law) (1994).

In sum, it may thus be established that, in so far as there is agreement as to the periodisation of the history of international law, and above all as to the question of where one locates the limits of those periods, that agreement consistently follows the structure which is set out in this book.

This structure is based on the conviction that it is important to recognise and demarcate the close connection between legal theory and State practice, and to comprehend that both are forms of expression of the same power, which characterise the political style of an epoch just as much as its principles of social, economic and legal organisation. The basic concept upon which the following investigation is founded, and to which it returns, is thus the cohesiveness of the law of nations and the international political system. The historical epochs of the modern law of nations are thus identical to those of the modern State system; this is the simple thesis of this book, which may to some readers perhaps appear banal. Yet how could it be otherwise, as the State system is necessarily the substrata which underlies the international legal order? It is the pre-established, preordained order of the thing, in which the »ambience« of the law of nations (to quote Dietrich Schindler who used this term for the prerequisites of constitutional law) is realised.[14]

12 Verosta, »Regionen und Perioden«, p. 17.
13 Verosta, »Die Geschichte des Völkerrechts«, pp. 67 & 71.
14 Schindler, *Verfassungsrecht und Soziale Struktur* (Zürich, 1932), p. 92 ff.

II. The Origins of the Law of Nations

1. What is the Law of Nations?

Twentieth century textbooks still refer to Hugo Grotius as the »Father of International Law« and to the Peace of Westphalia of 1648 as the »prelude to modern international law«. As far as they are concerned, searching for the specific starting points of a law of nations in Antiquity and the Middle Ages is solely a matter of historical interest.[15]

This narrow view under which the history of the law of nations was perceived, was the logical consequence of an understanding which could only conceive of modern sovereign States as subjects of this law. There is, however, no compelling reason to infer the idea of an international legal order from one of its time-limited manifestations.

The question of whether a law of nations existed in Antiquity and the Middle Ages can only reasonably be answered by departing from the conventional thinking and established categories of modern international law and considering the structural characteristics of an international legal order to be the essential criteria for examination.[16]

In sum, an international legal order can only be assumed to exist if there is a plurality of relatively independent (although not necessarily equal-ranking) bodies politic which are linked to each other in political, economic and cultural relationships and which are not subject to a superimposed authority having comprehensive law-making jurisdiction and executive competence. In their mutual relations these bodies politic must observe norms which are deemed to be binding on the basis of a legal consciousness rooted in religious, cultural and other common values.

It is only a question of terminological agreement as to the degree of mutual inter-dependence which is required to be able to speak of an international legal order and, *vice versa*, as to the degree of power exercised by a superimposed central authority which is sufficient to deny a legal character to such an order. The limits of such a concept are necessarily fluid. Dogmatic attempts to pin them down for historical analysis will invariably prove fruitless. Likewise, the oft-used formula that international law is essentially a law of co-ordination, and is thus distinct from orders of national and constitutional law, being essentially a law of subordination, seems inappropriate and not really pertinent.[17] Differences in the ranking and

15 Liszt & Fleischmann, *Völkerrecht*, p. 20 ff.

16 Preiser, in his extensive studies of the history of international law, laid out just such a conception. See especially: »Die Epochen der antiken Völkerrechtsgeschichte«, (1956) 23/24 Juristenzeitung 737; *Macht und Norm in der Völkerrechtsgeschichte* (1978); »Frühe völkerrechtliche Ordnungen der aussereuropäischen Welt«, p. 96 ff.

17 E. Kaufmann, *Das Wesen des Völkerrechts und die clausula rebus sic stantibus* (1911), p. 128 ff.

degrees of independence of the different units of the political system and even the existence of an autonomous, superimposed central authority do not (in so far as the legislative, judicial and executive competence of the latter remains incomplete) preclude the existence of an authentic law of nations. The inter-State law of a society of sovereign and equal States is only one possible configuration of an international legal order. There is no compelling reason to restrict the concept of a law of nations to this specifically modern form.

2. Early International Legal Orders in Occidental Antiquity and in the Non-European World

In the course of intensified research on the history of the law of nations it proved necessary to locate its origins increasingly far in the past. The great importance of late Spanish scolasticism of the sixteenth century for the development of a systematic theory of law had long been noted by certain authors. However, it was only in the 1920s that it was fully perceived that the thinkers who laid the intellectual foundations of modern international law had done so long before Grotius.[18]

As a result of recent research, which claims to have discovered that certain »Frühformen« (early forms) of the modern State already existed in the late Middle Ages,[19] and the work of other scholars who have also seen the beginnings of a State system in that period,[20] the question of whether international law existed in those distant centuries has been posed and investigated more fully than ever before. Finally, recent research has focused increasingly on the law of classical Antiquity, as well as that of pre-classical Antiquity and the ancient Orient.

The work of Wolfgang Preiser was pioneering in this field. He examined the origins of modern international law,[21] the law of pre-classical Antiquity, the historical epochs of the law of nations in Antiquity, and early international legal orders in the non-European world.[22] Although he considered it justifiable to speak of a structurally unchanged European law of nations spanning two and a half millennia,[23] he added an essential qualification: that only from the late Middle Ages is it possible to find consistent traces of an international legal order which combines the international legal phenomena of all epochs into a reasonably functional system.[24]

18 One of the first authors fully to realise the importance of the Spaniards was Ernest Nys, *Le droit de la guerre et les précurseurs de Grotius* (1882).
19 *Infra*, p. 17.
20 *Infra*, pp. 13 ff.
21 Preiser, *Macht und Norm in der Völkerrechtsgeschichte* (1978), pp. 9-26.
22 *Idem* p. 105 ff., p. 127 ff.
23 Preiser, »Über die Ursprünge des modernen Völkerrechts«, in *Internationalrechtliche und Staatsrechtliche Abhandlungen, Festschrift W. Schätzel* (1960), p. 387.
24 Preiser, »Völkerrechts-Geschichte«, in H. Kunst et al., *Evangelisches Staatslexikon* (2nd edn.), 1975, p. 2823; *idem.*, *Macht und Norm in der Völkerrechtsgeschichte* (1978), p. 73.

Above all, the assumption of an uninterrupted continuity of the international legal order must be limited by an acknowledgment of the impossibility of proving a context for the principles and the practice of a law of nations reaching back beyond the immediately preceding epoch. Thus, the institution of permanent diplomatic representation cannot be derived from Roman models; nor can the modern institution of consular representation be derived from the ancient Greek proxenie (a kind of public hospitality granted to certain foreigners).[25] All substantial formal correspondence between ancient and modern peace treaties and alliances signifies nothing more than that they are parallel independent developments,[26] a phenomenon which has long been well-known in the field of domestic comparative law. This phenomenon may be explained on the basis of the common ideas, needs and reactions of all human beings, that is, of a psychologically rooted common substructure of humankind.[27] The hypothesis of continuity is thus reduced to involve only some conceptions and ideas underlying the principles and practice of international law, as for instance the idea of natural law or the doctrine of just war.[28]

Ulrich von Wilamowitz-Moellendorff's often quoted sentence, that »von den Disziplinen der modernen Rechtswissenschaft nur das Völkerrecht direkt aus griechischer Wurzel stammt« (amongst the disciplines of modern legal science only the law of nations has direct Greek origins), must be reconsidered in the light of this proviso.[29]

The continuity of cultural historical development from Antiquity to the Middle Ages is not necessarily equivalent to the continuity of specific legal principles and conceptions. The law of Antiquity was not familiar, for example, with a legal concept spanning contract and custom and joining them together in one system. Nor was it familiar with the idea of an international legal community binding the different Greek city-States together and forming the basis of international legal rights and duties.[30]

Wengler's account of the historical development of the international legal order remains (among others) accurate, based as it is on the starting point that today's legal order, which is factually valid for the whole world and which is designated »international law«, does not reach back further as an historically developed chain of norms than the last phase of the occidental Middle Ages.[31]

25 Preiser, »Über die Ursprünge des modernen Völkerrechts«, p. 377.
26 Koschaker, »Keilschriftrecht«, (1935) 14 Zeitschrift der Deutschen Morgenländischen Gesellschaft 31.
27 See: Fehr's comparison of the Babylonian *Codex Hammurabi* with the popular laws of the Salian Franks (*Hammurabi und das salische Recht. Eine Rechtsvergleichung*, 1910, p. 136); Preiser, »Über die Ursprünge des modernen Völkerrechts«, p. 379.
28 Preiser, »Über die Ursprünge des modernen Völkerrechts«, p. 379 ff.
29 Mommsen, *Strafrechtliche Anfragen des Romanisten*, 1905, p. 29.
30 Paradisi, *Civitas Maxima, Studi di Storia del Diritto Internazionale*, 2 Vols., 1974, p. 628.
31 Wengler, *Völkerrecht*, 1964, Vol. 1, p. 107.

This is also the point of departure which determines the structure of this book, which in its presentation of the historical development of international law does not extend to the international legal orders of Antiquity,[32] nor to the non-European world.[33]

The international legal orders of preclassical and classical Antiquity, although related to modern international law through historical ideas, will only be mentioned here and not analysed individually. The same is true of the transition period from Antiquity to the Middle Ages.

As Preiser has demonstrated, in Antiquity an international legal system which was designated as such and operated between relatively independent »States« of different types and sizes (from the large Oriental empires to the Greek city-States) existed in only three cases and in each case only for about two hundred and fifty years. The first was in the Middle East from about 1450 to 1200 B.C. between Egypt, Babylonia and the Hittite Empire (temporarily including the Mitanni Kingdom in northwest Mesopotamia as well as the order of reciprocal relations that was inspired by the Middle Assyrian Empire). The second was between 600 and 338 B.C. when the Greek city-States were not only relating to each other, but also to the Persian Empire and Carthage in a diverse, legally organised series of interactions. The third was in the Roman-Hellenistic world between the middle of the fourth century B.C. and the full development of the all-powerful Roman Empire (about the time of the 168 B.C. Battle of Pydna and the breakup of Macedonia). In this period it is possible to speak of an international legal order, one that at its high point was led above all by the Italian League under Roman rule, Carthage and the three Hellenistic successor States, Macedonia, and the Kingdoms of the Seleucids and the Ptolemies.[34]

In the transition period between Antiquity and the Middle Ages (from about 400 to 800 A.D.) a multitude of principles and relations developed among the numerous, independent political entities co-existing at that time which are typical of a law of nations. However, they did not constitute a coherent international legal order.[35]

32 Hartwig Bülck has attempted to explore the origins of the law of nations far back into the early history of humankind: »Von den Ursprüngen des Völkerrechts«, in *Recht im Dienste des Friedens, Festschrift für E. Menzel*, 1975, p. 215.

33 Preiser's »Frühe völkerrechtliche Ordnungen der aussereuropäischen Welt« described functioning international legal orders (other than particular, isolated international law principles and relationships) in the Ancient Orient, in Europe, and in the Islamic world.

34 Preiser, *Macht und Norm in der Völkerrechtsgeschichte*, 1978, pp. 34 & 73.

35 *Ibid.*, p. 38 ff., 74.

3. A Medieval »Law of Nations«?

Only in the last fifty years has the question of whether a law of nations existed in the Middle Ages been answered in the affirmative by scholars of international legal science. During this time ever more specialised research has been undertaken by individual scholars,[36] and works on the overall history of international law went beyond generalities to provide concrete descriptions of the form of the Medieval law of nations.[37]

For too long such developments were prevented by an exaggerated image of Medieval Christian unity under the spiritual and temporal regime of the two universal powers, the Holy Roman Emperor and the Pope. An arbitrarily narrowed concept of a law of nations, oriented entirely toward the image of the modern State, contributed to this view.[38]

Dazzled in particular by the ideological universalism of Hohenstaufen imperialism and the rival universalism of the great political Popes, historians contested whether a law of nations existed during the Middle Ages. As but one example of many, a well-known textbook of the 1920s persisted in this denial with the following summary judgment: »As long as imperial and Papal universalism governed the Occident, there was no ground on which a law of nations could have been established, there were no self-reliant inde-

36 An impressive model of such detailed research was Paradisi's description (*supra*, p. 5, fn. 10) of the development of an international legal order in the transition period between Antiquity and the Christian Middle Ages.

37 Arthur Wegner, »Geschichte des Völkerrechts«, in *Handbuch des Völkerrechts*, 1936, Vol. 1, Part 3, p. 65 ff., devoted a great deal of space to the »christlichen Völkergemeinschaft des Abendlandes« (the community of Occidental Christendom), but dealt with it only in very general terms. For more detailed treatments, see: Stadtmüller, *Geschichte des Völkerrechts* (1951); Preiser in *Wörterbuch des Völkerrechts*, 1962, Vol. 3, p. 686-95; Reibstein, *Völkerrecht*, 1957, Vol. 1, p. 61 ff.

38 H. Kipp (*Völkerordnung und Völkerrecht im Mittelalter*, 1950, p. 93 ff.) began with the obsolete image of a universal spiritual and temporal regime ruled by Pope and Emperor. However, as Janssen commented, this was an image »dass sich in dieser Form höchstens in den Köpfen weniger verstiegener Denker befunden hat« (that in its highest form existed only in the minds of a few eccentric thinkers) (*Die Anfänge des modernen Völkerrechts*, 1964, p. 38). Kipp sought to salvage the existence of an international legal order of the Middle Ages with an artificial and unconvincing construction. In this construction the peoples of the Middle Ages, who already belonged to empires, gave their support to an encompassing, autonomous power through the conclusion of an international law-like agreement. As a result of this »positiv gesetzten Völkerrectsakt« (positive legitimate international legal act) the basis of the international law of the Middle Ages was (supposedly) secured. For another criticism of this approach see: F. Dickmann, *Friedensrecht und Friedenssicherung*, 1971, pp. 99 & 177 fn. 1.

pendent States«.[39] This view did not penetrate to the heart of Medieval reality. It is true that there were no »States« in the modern sense of the word,[40] but there were autonomous communities capable of engaging in legal relations with one another.

At no point in time did the universal powers, Emperor and Pope, exercise a power which extinguished the political autonomy and independence of the temporal holders of particular power. As a result of competing imperial and papal claims for world supremacy, even the ideological »universalism« of the Hohenstaufen period and the late Middle Ages was unable to realise such claims in political terms. The specific legal configurations of the Middle Ages have always demonstrated that this was clearly the case. Even legal thinkers who remained fundamentally attached to a universal view of the world – like Bartolus – did take into account political reality at a second level of their thinking. They only differed from each other in the manner in which they linked the two levels of their thought.

The foundations on which an authentic law of nations could develop did exist in the Middle Ages, provided one does not unnecessarily narrow the concept by bringing it into conformity with the prerequisites of the modern world of States – an exercise for which there is no compelling reason. On this basis an international legal order was able to develop, although it was one with its own particular rank and character.

39 »Solange die kaiserliche und päpstliche Universalidee das Abendland beherrschte, fehlte der Boden, auf dem das Völkerrecht hätte wachsen können: es fehlten selbständige, unabhängige Staaten«. – E. von Waldkrich, *Das Völkerrecht in seinen Grundzügen dargestellt* (Basel, 1926), p. 51. The existence of medieval international law was denied by Bonfils-Fauchille, Despagnet, F. von Martens, von Ullmann, von Liszt, Niemeyer, and M. Huber. Listed by Zimmermann, »La crise de l'organisation internationale à la fin du moyen âge«, (1933 II) 44 Recueil des Cours 315, 319. Again, Nussbaum (*supra*, p. 3) departed from the view that the intellectual climate of the Medieval Occident was unfavourable to the development of international law (p. 19). According to him the Holy Roman Empire was legally a great monarchy. Therefore, no »international« relations could develop between the members of this empire, namely the princes or the free cities.

40 J. Wackernagel (*Die geistigen Grundlagen des mittelalterlichen Rechts*, 1929) was right to point out that the modern image of international law as the legal order existing between sovereign States, did not fit the Medieval world. With reason he considered that an international legal order may have existed in the Middle Ages. However, I consider his further explanations of the structure of the »überstaatliche Einheit des Mittelalters« (supra-national unity of the Middle Ages) to be contestable.

III. International Legal Orders of the Modern State System

1. The Genesis of the Modern State System

The character of modern international law, and its transformations, depend upon the structure of the modern State system and the changing political groupings which have developed within that system. This is the most important feature which distinguishes all modern systems of international law from their Medieval predecessors and ascribes to them certain common traits. The powers of the Medieval world cannot be compared with the power of modern territorial, national or imperial States with their enormous arsenals. They were not linked in the intensive interrelationship which is the specific and characteristic mark of a »State system«, in which each member, »with each step that it takes beyond its own realm, has to take account of the others' interests and include them in its own calculations«.[41] A State system in the sense of such an intensive interrelationship has existed in Europe since 1494 when the battles incited by the invasion of Italy by Charles VIII of France were fought. This classical theory of a State system was developed by the English politician and publicist Bolingbroke in the early eighteenth century and expanded upon in the nineteenth century by German historians such as Heeren, Alfred Dove and Max Lenz.[42] In this tradition, more recently, Windelband began his account of the *Auswärtige Politik der Grossmächte* (Foreign Policy of the Great Powers) with the year 1494. Although Eduard Fueter began his »Geschichte des europäischen Staatensystems von 1492-1559« (History of the European State System from 1492 to 1559) at a point two years earlier, he too adopted the same basic conception.[43]

Windelband refused to call the political order of Medieval Europe a »State system« mainly because the various States were still not internally complete. It was only as a result of their internal completion that States accumulated sufficient internal political power to permit activities abroad. Windelband wrote:

»Hitherto States had lacked the internal maturity; their particular, State-like character was not yet sufficiently developed. Everything was still in flux; States had not yet distinguished themselves from one another with unequivocal sharpness. This situation changed. These internal develop-

41 »Bei jedem Schritt, den es über den eigenen Bereich hinaus tut, auf die Interessen der anderen Rücksicht zu nehmen und mit ihnen zu rechnen hat« – Windelband, *Die Auswärtige Politik der Grossmächte in der Neuzeit von 1494 bis zur Gegenwart* (3rd edn.), 1936, p. 11.

42 See: A.H.L. Heeren, *Geschichte des europäischen Staatensystems und seiner Kolonien vom 16. Jhdt. an*, 2 Vols., 1809; Max Lenz, *Die Grossen Mächte*, 1900.

43 Eduard Fueter, »Geschichte des europäischen Staatensystems von 1492-1559«, in *Handbuch der mittelalterlichen Geschichte* (1919), p. 4.

ments were not yet complete at the end of the Middle Ages, but during the transition from the fifteenth to the sixteenth centuries the European nations emerged as developed personalities. This was particularly true of the three great Western realms. The reigns of three great rulers, Ferdinand the Catholic of Spain, Louis XI of France and Henry VII of England, marked sharp turning points in the histories of their nations. Francis Bacon referred to them, not without reason, as the three Magi of their time, and Machiavelli celebrated Ferdinand as the embodiment of a new kind of ruler. Along with the strengthening of internal structures came of its own accord an ambition to play a more significant role abroad. An enormous increase in reciprocal contacts thus occurred. This led to a continual series of wars, which in turn accelerated and intensified the internal centralisation in individual States. Thus began a development of the European world which was based on different foundations from those of previous epochs and which completely transformed the structure of that world«.[44]

In a similar manner, Fueter indicated that »at that time a truly new state of affairs was being constructed«.[45] He saw the cause for this development as being that the Great Powers, which towards the end of the fifteenth century had begun to assume a character different from other States because of their internal consolidation and external expansion, consistently focused on one large foreign policy issue: the domination of Italy. This concentration on one single, albeit central problem created an entirely new situation:

»Although there had previously been no lack of international coalitions for offensive or defensive purposes, from now on combinations of this kind were more systematically organised and rationally treated than in previous centuries. They were more focused than before on serving aims which related to the European State system as a whole, rather than just to bilateral relations. Changes within one State or in the relationship between two

44 »Bisher hatte ihnen die innere Reife gefehlt, ihre staatliche Eigenart war noch nicht ausgeprägt genug. Alles war noch im Fluss, sie hoben sich noch nicht mit eindeutiger Schärfe voneinander ab. Das ist anders geworden. Wenn auch diese innere Entwicklung bis zum Ende des Mittelalters durchaus noch nicht zu vollständigem Abschluss geraten ist, so stehen doch um die Wende des 15. und 16. Jahrhunderts die Nationen als ausgebildete Persönlichkeiten da. Vor allem gilt das für die drei grossen Westreiche. Die Regierungszeiten der drei grossen Herrscherpersönlichkeiten, Ferdinands des Katholischen von Spanien, Ludwigs XI. von Frankreich und Heinrichs VII. von England, bedeuten tiefe Einschnitte in der Geschichte ihrer Völker. Nicht mit Unrecht hat Francis Bacon sie als die drei Magier ihrer Zeit bezeichnet, und auch Machiavell feiert Ferdinand als die Verkörperung eines neuartigen Herrschertyps. Mit der Kräftigung des innerstaatlichen Baues entsteht von selbst das Bedürfnis, auch nach aussen hin eine grössere Rolle zu spielen. Daher die gewaltige Steigerung der gegenseitigen Berührungen. Sie hat wieder zur Folge den fortwährenden Kampf, und er verstärkt dann weiter die innere Befestigung: die Zentralisation der einzelnen Staaten wird infolgedessen auf die Höhe geführt. Es ist also wirklich eine auf andere Grundlage als bisher beruhende Entwicklung der europäischen Welt, die nun einsetzt; deren Struktur ist völlig umgestaltet«. – Windelband, *Die Auswärtige Politik der Großmächte in der Neuzeit von 1494 bis zur Gegenwart* (3rd edn.), 1936, p. 25.

45 Eduard Fueter, *Geschichte des europäischen Staatensystems von 1492-1559*, 1919, p. 5.

States now had repercussions on the entire international situation, which were of greater magnitude than those which had previously been experienced. From there emerged a phenomenon which in this distinct form had not been seen before: within certain periods all the States of Europe, even the smallest and the most remote, were drawn into the disputes of the large States and brought into one or other of the rival coalitions«.[46]

This classical theory was first challenged by Kienast in his study on »Die Anfänge des europäischen Staatensystems im späteren Mittelalter« (The Beginning of the European State System in the Late Middle Ages).[47] He spoke of a »Medieval State system« which, although different in essence from the modern State system, nevertheless deserved to be designated as such:

»A unified foreign policy was frequently frustrated by the independence of the territorial sovereigns; multiple feudal bonds effaced the distinction between internal and external policy; permanent legations were still unknown, which meant that the interplay of diplomacy could not be co-ordinated to the same degree as in modern times. On the other hand, the fact that the European world was still not uniformly divided, that the Albigensian War in the south remained almost untouched by the great power struggles which occurred concurrently in the north, that Aragon was left undisturbed by Philip August, to attempt the establishment of a Catalonian-Toulousian-Provençal Empire, and that the banished Raimond von Toulouse waited in vain for the assistance of King John of England – all were phenomena for which one may find parallels until late in the eighteenth century. Only after the Napoleonic period was there a complete interweaving of interests in Europe. Nevertheless, these were only differences of degree. The essential point is that with the collapse of the Empire after the death of Henry VI the indispensable precondition for the genesis of a European State system was created. If one were to deny its possibility because during the Middle Ages neither the idea of a universal monarchy nor that of a universal empire had yet disappeared, one would be according greater importance to political theory than to contradicting facts. Where one situates the actual emergence of the European State system is another question. The answer to this ques-

46 »An internationalen Koalitionen zu Offensiv- und Defensivzwecken hatte es schon früher nicht gefehlt; aber derartige Kombinationen wurden nun systematischer betrieben und bewusster aufrechterhalten als in den vorhergehenden Jahrhunderten, sie setzten sich auch viel bestimmter als bisher Ziele, die das ganze europäische Staatensystem und nicht bloss das Verhältnis zwischen zwei Staaten betrafen. Viel stärker als früher wirkten nun Veränderungen innerhalb eines Staates oder innerhalb des Verhältnisses zwischen zwei Staaten auf die gesamte internationale Situation zurück, und daraus entsprang dann die vorher in dieser ausgeprägten Form nicht nachweisbare Erscheinung, dass während gewisser Zeiträume alle Staaten Europas, auch die kleinsten und entlegensten, in die Gegensätze der Grossstaaten hineingerissen und mit einer der rivalisierenden Gruppen in Verbindung gebracht wurden«. – Eduard Fueter, *Geschichte des europäischen Staatensystems von 1492-1559*, 1919, p. 4.

47 W. Kienast, »Die Anfänge des europäischen Staatensystems im späteren Mittelalter«, (1936) 153 Historische Zeitschrift, p. 229 ff., 236, 270.

tion depends on the extent of reciprocal relations, reaching beyond neighbouring States, and on the sensitivity of this political nervous system, whereby a stimulus spreads from its place of origin to the other limbs, causing a counter-reaction. It is these power games which control the interests of States. Whenever these interests are relatively stronger and more solidly established, the system will function in a more certain, more rational, and more transparent manner. We believe that the conditions already existed from about the year 1198, that from that date forward they were sufficiently fulfilled for one to be able to speak of an European State system«.[48]

In the end it is a terminological question as to what extent of political entanglement one refers to when using the term »State system«. Kienast himself left the question unanswered, in that what he referred to as the »Medieval State system« differed in substantial ways from the State system of modern times. Tellenbach also located the origins of the European State system in the late Middle Ages – »although only the origins«, as he stressed.[49] Preiser, who also assumed that a European State system already existed in the thirteenth and fourteenth centuries, placed restrictions on this

48 »Die Selbstständigkeit der Territorialherren vereitelt oft eine einheitliche Aussenpolitik; die vielfachen Lehnsbande verwischten den Unterschied zwischen innerer und äusserer Politik; das feste Gesandtschaftswesen fehlte noch, die Diplomatie konnte sich noch nicht so aufeinander einspielen wie in der Neuzeit. Andererseits, dass die europäische Welt noch nicht einheitlich durchgegliedert war, dass die Albigenserkriege im Süden von den gleichzeitigen grossen Machtkämpfen im Norden fast unberührt blieben, dass Aragonien, von Philipp August ungestört, die Bildung eines katalanisch-tolosanisch-provenzalischen Reiches versuchen konnte und der gebannte Raimond von Toulouse vergeblich auf die Hilfe Johanns von England wartete, ist eine Erscheinung, für die sich Parallelen bis tief ins 18. Jahrhundert finden. Erst seit der Napoleonischen Zeit ist die Interessenverflechtung in Europa nahezu lückenlos. Bei all dem Angeführten handelt es sich doch nur um Gradunterschiede. Das Wesentliche ist dies: Der Zusammenbruch des Imperiums nach dem Tode Heinrichs VI. bildet die unumgängliche Voraussetzung dafür, dass ein europäisches Staatensystem überhaupt entstehen konnte. Wollte man seine Möglichkeit im Mittelalter schon deshalb leugnen, weil die Idee eines universalen Kaisertums noch nicht verschwunden war, so hiesse das eine politische Theorie höher einschätzen als die ihr widersprechenden Fakten. Wann man die tatsächliche Geburtsstunde des europäischen Staatensystems ansetzen will, ist eine andere Frage. Die Antwort hängt ab von dem Umkreis der gegenseitigen Beziehungen, der sich nicht auf Nachbarstaaten beschränken darf, von der Empfindlichkeit dieses politischen Nervensystems, wo ein Reiz sich von seinem Ursprungsort in die anderen Glieder fortpflanzt und eine Gegenwirkung auslöst. Was dieses Kräftespiel regelt, sind die Interessen der Staaten. Je fester und stärker sie sind, desto sicherer wird das System funktionieren, desto rationaler und durchsichtiger wird es sein. Wir glauben, die Bedingungen waren bereits zu dem genannten Zeitpunkt, also etwa seit dem Jahre 1198, in ausreichendem Masse erfüllt; und man darf von da ab von einem europäischen Staatensystem sprechen«. – W. Kienast, »Die Anfänge des europäischen Staatensystems im späteren Mittelalter«, p. 229 ff., 236, 270.

49 »Allerdings nur die Anfänge« – Tellenbach, »Vom Zusammenleben der abendländischen Völker im Mittelalter«, in *Festschrift G. Ritter*, 1950, p. 1, 41.

assumption, stating that the system did »not yet [demonstrate] all of the characteristics of the developed modern order of States«.[50]

Werner Näf traced the »Frühformen des modernen Staates im Spätmittelalter« (Early Forms of the Modern State in the Late Middle Ages).[51] He also dealt in various ways with the idea of the State system and with the historical development of the European State system, from its beginnings up to the establishment of a distinct world system. He managed to compare the similarities between the late Medieval origins of that system more and more with the specific qualifications of restrictive formulations. He spoke of the »ascent of a modern European State system in the last centuries of the late Middle Ages«, of a »separation of particular State groups«, and of »regions« in the late Middle Ages, all of which »prepared the way for the establishment of an European State system«.[52] During this period it was possible, for the first time ever, »to point towards a modern State system«, although »for good reasons one could only speak of such a system from the seventeenth century«.[53] It would be »premature«, he concluded, »to consider the fifteenth century as anything more than a preparatory period for a real European State system. Instead, States formed alliances in that epoch only in the face of crises. Individual complex questions had not yet affected, influenced or begun to overlap one another; the various series of events lay side by side and distinct from one another. Threads connecting all of Europe barely existed«.[54] One could first speak of a »State system« only once such »connecting threads were continuous, apparent, permanent, or at least repeatedly taken up«.[55] This was achieved as a result of the rise of the Habsburgs to the rank of a Great Power:

»The Habsburgs truly broke through the barriers of European isolation. They reached for, established contact, and conversed with every other power, with the notable exception, for that time, of the Scandinavians.

50 »Noch nicht alle Züge der entwickelten neuzeitlichen Staatenordnung« – Preiser in *Wörterbuch des Völkerrechts*, 1960, Vol. 3, p. 691.

51 This being the title of his article in (1951) 171 Historische Zeitschrift 225.

52 »Aufstieg eines neuzeitlichen europäischen Staatensystems in den spätmittelalterlichen Jahrhunderten«; »Sonderung bestimmter Staatengruppen«; »Regionen«; »die Bildung eines europäischen Staatensystems erst vorbereiten« – Näf, »Die Entwicklung des Staatensystems«, (1957) 9 Schweizer Beitrage zur allgemein Geschichte 5, 6 & 30. See also: Näf, *Die Epochen der neueren Geschichte* (2nd edn.), 1959, Vol. 1, p. 199.

53 »deutete sich zum ersten Male ein neuzeitliches Staatensystem an«; »mit grösserem Recht erst seit dem 17. Jahrhundert sprechen« – Näf, *Die europäische Staatengemeinschaft in der neueren Geschichte*, 1943, pp. 5 & 9.

54 »Verfrüht ... dem 15. Jahrhundert mehr als die Vorbildung eines wirklichen europäischen Staatensystems zuzuschreiben. Es war jeweils eine Gruppe von Staaten, die sich um einen Problemmittelpunkt sammelte. Die einzelnen Fragenkomplexe berührten, beeinflussten, überschnitten sich noch nicht; die Schauplätze des Geschehens lagen geschieden nebeneinander. Verbindungsfäden durch ganz Europa gab es noch kaum«. – Näf, *Die Epochen der neueren Geschichte* (2nd edn.), 1959, Vol.1, p. 282.

55 »Staatensystem«; »sobald durchlaufende, dauernd festgehaltene oder wenigstens immer wieder aufgenommene Fäden sichtbar werden« – Näf, *Die Epochen der neueren Geschichte* (2nd edn.), 1959, Vol. 1, p. 199.

There was no large State in Europe (outside Scandinavia) which did not border on Habsburg territory. Yet conflicts can quickly, uncannily, multiply from one into many. On five flanks consecutively, in the Pyrenees, the Netherlands, the Jura, in Italy from Milan to Sicily and – at least indirectly – in the western Alps, France, the strongest single State in Europe, formally surrounded neighbouring Habsburg possessions and claims. The consequences of this were to be that each individual political question would tend to extend beyond its local ramifications and become part of, and add to, this great pro- or anti-Habsburg rivalry wherever it was encountered in Europe. It was clearly this development which led to the struggle for Italy«.[56] With this conclusion Näf thus returned to the starting date of 1494.

It is undoubtedly a merit of recent research that the early, frequently overrated effect of the universal powers of Emperor and Pope on the political structure of the late Middle Ages was subjected to a restrictive evaluation, and that the emphasis was placed on the actual independence and equality of the members of the evolving plurality of States. Preiser, in particular, was correct in his judgment that the prerequisites for the development of an international legal order clearly existed.[57]

On the other hand, there are good reasons to hold to the view that the genesis of a true State system in Europe is to be dated at the turn from the fifteenth to the sixteenth centuries.

Kienast also had to concede, in the conclusion of his essay which contributed to the development of new doctrine, that a crucial change occurred at this turning point between the two centuries as a result of »two new events«. One was the formation of the Spanish-Habsburg world empire that joined the previously separate spheres of East and West; the other, which was more significant for his thesis, was the balance of power. As Kienast explained: »Never before had a number of States allied together for the sole purpose of preventing the predominance of one of them«.[58] The principle of a European balance of power, which had been recognised within Italy since the

56 »Habsburg durchbricht nun wirklich die europäischen Isolierzonen, gelangt und gerät mit jeder Macht – mit Ausnahme nur, vorerst, des Nordens – in Kontakt. Es gibt keinen einzigen grösseren Staat in Europa – abgesehen wiederum vom Norden -, der nicht an eines der habsburgischen Länder grenzte. Für *einen* aber summieren sich unheimlich die daraus aufgesteigenden Konflikte. An fünf Flanken zugleich, an den Pyrenäen, in den Niederlanden, am Jura, in Italien von Mailand bis Sizilien und – wenigstens indirekt – an den Westalpen, trifft Frankreich auf eine förmliche umringende Nachbarschaft habsburgischer Besitzungen und Ansprüche, und Frankreich ist der stärkste der nationalen Einzelstaaten Europas. Die Folge wird sein, dass jede politische Einzelfrage die Neigung haben wird, sich über ihren lokalen Rahmen hinweg auszuweiten, habsburgische und antihabsburgische Mächte, wo immer in Europa sie sich begegnen, widereinander zu stellen. Diese Entwicklung nahm, mit der grössten Deutlichkeit, der Kampf um Italien«. – Näf, *Die Epochen der neueren Geschichte* (2nd edn.), 1959, Vol. 1, pp. 283 ff.

57 Preiser in *Wörterbuch des Völkerrecht*, 1960, Vol. 3, pp. 690-95.

58 »Nie hatten sich zuvor, lediglich um dem Vorwalten eines anderen zu wehren, eine Reihe von Staaten zusammengeschlossen«. – Kienast, »Die Anfänge des europäischen Staatensystems im späteren Mittelalter«, (1936) 153 Historisches Zeitschrift 229, 271.

time of Cosimo Medici, first entered general European policy with the League of Venice. This characteristic of a fully, thoroughly constructed State system remained alien to the whole of the Middle Ages.[59] Indeed Windelband, who asserted that the political balance of power did not yet exist in the thirteenth, fourteenth and fifteenth centuries, considered it to be a determinative element of the modern State system, along with the increasing frequency of relations and interdependencies.[60] It is significant that in English and French the term »State system« is more or less synoymous with »balance of power« and »*équilibre*«.[61]

The idea that the State system is unthinkable without the regularising function of the balance of power was, until most recent times, also the view of all of its historians. For them the balance of power, overseas discoveries and permanent diplomacy emerged together, with the latter being the »institute which characterises the modern world of States«.[62] According to Willy Andreas, they did so »as the turning point of the end of the fifteenth and beginning of the sixteenth centuries approached«.[63] Ludwig Dehio, who along with Kienast co-edited the Historische Zeitschrift, was even more precise in identifying a date. In 1948, many years after Kienast had published his treatise and without mentioning Kienast's views, Dehio defined the critical point as having been reached »in a rather precise blink of an eye, namely the beginning of the Great Power struggle over Italy in the year 1494«.[64]

2. The Balance of Power as a Regulatory Principle of the State System

Like many other political concepts of modern times, that of the balance of power originated in Italy. For the first time in history the Italian city-republics had, through shifting alliances, developed a micro-balance of power. Lorenzo de Medici (»il Magnifico«) used the metaphor for his alliance with Ludovicio Sforza (the Duke of Milan) and Ferdinand of Naples against Venetian predominance. This was reported by Francesco Guicciardini

59 Kienast, »Anfänge des europäischen Staatensystems«, p. 271.

60 »State systems and the balance of power are two ideas, which are inseparably bound together« – Windelband, *Die Auswärtige Politik der Grossmächte in der Neuzeit von 1494 bis zur Gegenwart* (3rd edn.), 1936, p. 25.

61 Raymond Aron (*Frieden und Krieg* (Kelkheim, 1986), p. 157), speaking of a »multipolar system«, added: »Generally authors call those systems ›balance of power‹, which I refer to as ›multipolar‹«.

62 »Für die moderne Staatenwelt charakteristischen Institut« – Willy Andreas, »Italien und die Anfänge der neuzeitlichen Diplomatie«, in Andreas, *Staatskunst und Diplomatie der Venezianer*, 1943, pp. 27 & 55.

63 »Als gegen Ende des 15. und zu Beginn des 16. Jahrhunderts die Zeitenwende heraufzog« – *ibid.*

64 »In einem ganz bestimmten Augenblick, nämlich bei Beginn des Kampfes der Grossmächte um Italien im Jahre 1494« – Dehio, *Gleichgewicht oder Hegemonie*, 1948, pp. 24 & 46.

(1482-1540), the classical Italian historian, in his *Istoria d'Italia* (History of Italy).[65]

Since that period the balance of power has become a dominant political concept in Europe. Francis Bacon wrote the following words in his *Considerations Touching a War with Spain inscribed to Prince Charles*:

»It is so memorable, as it is yet as fresh as if it were done yesterday, how that triumvirate of kings, – Henry the Eighth of England, Francis the First of France, and Charles the Fifth Emperor and King of Spain, – were in their times so provident, as scarce a palm of ground could be gotten by either of the three, but that the other two would be sure to do their best, to set the balance of Europe upright again«.[66]

More important than the theoretical elaboration of the principle is the fact that a practical balance of power policy could be observed in the world of the Italian republics and principalities of the *quattrocento* and more broadly in Europe as a whole. It did not exist merely as a slogan understood to represent an ideal, nor as a refined and consistent political dogma, but as an intention to provide a form of protection for small States against the threatening manoeuvres of large States, and above all as a means of self-assertion between large States.[67]

Andreas, who made this observation, clung to the view that one could speak of the genesis of a European State system only »as the period of transition between the end of the fifteenth and the beginning of the sixteenth centuries«.[68] He pointed to the development of another institution which was characteristic of the modern State system, that of permanent diplomacy, and wrote: »Hand in hand the theory and the practice of the balance of power gradually advance«.[69]

3. Permanent Diplomacy – Infrastructure of the State System

While most institutions of modern international law, particularly the politically relevant ones, have followed the transformations of the State system and from epoch to epoch have modified themselves, there were others, in particular those rules and principles which regulated the formal and technical foundations of interaction, which were less affected by the changes in the State system and in the arrangement of its constituent parts. The right

65 Guicciardini, *Dell'istoria d'Italia libri XX riscontrati da Remigio*, 1569, Libro primo, p. 2. Lorenzo de Medici said: »conoscendo, che alia Republica Fiorentina e a se proprio sarebbe molto pericoloso, se alcumo de maggiore potentati ampliasse piú la sua potentia, procurava con ogni studio, che le cose d'Italia in modo bilanciate si mantenessero, che piú in una, che in un altra parte, non pendessero«.

66 Bacon, *Considerations Touching a War with Spain inscribed to Prince Charles*, 1624, in *Works*, ed. 1740, Vol. 3, p. 513 ff.

67 Andreas, *Staatskunst und Diplomatie der Venezianer*, 1943, p. 55.

68 »Als gegen Ende des 15. und zu Beginn des 16. Jahrhunderts die Zeitenwende heraufzog« – *Ibid.*, p. 27.

69 »Hand in Hand geht mit jenem allmählichen Vordringen der Gleichgewichtstheorie und -praxis« – *Ibid.*, p. 55.

and organisation of legations, once it became established in the form of permanent diplomacy at the beginning of modern times, belongs to this latter category. For this reason I confine myself here to casting a brief glance over the origins of the legation and abstain from returning to its development in my subsequent discussions of each new period.[70]

The origins of permanent diplomacy are located in that historical environment, where a balance of power system developed in miniature in the world of the small Italian States of the fifteenth century.[71] One of the earliest verifiable permanent legations was that of Nicodemus de Pontremoli, who around 1448 was the representative of the Duke of Milan in Florence. It was not by accident that such a permanent diplomatic link was first instituted between those two States, for it was they who were most threatened by the expansionist policy of Venice, then the most powerful of the Italian republics. Here, as in all other cases, the most important motive for establishing permanent legations was the consideration that the weaker State needed to be informed, in good time, about any aggressive intentions on the part of the stronger State. Permanent legations were therefore frequently dispatched by one side only, from the courts of weaker States to those of stronger ones.

However, the request to receive a permanent legation and to maintain continuous relations often met with distrust and was frequently regarded as a sign of political weakness. Louis XI of France, who was celebrated as a master of diplomacy, refused several times to admit to his court a permanent legation from the Duke of Milan. In Italy, he said, a permanent legation might be a matter of friendship, whereas »with us it is regarded as a matter of distrust«.[72]

As a matter of fact both motives played a role in the dispatch of permanent legations. On the one hand, permanent legations resulted from interactions

70 This self-limitation is a consequence of the principle of selection on which this book is based. See: *infra*, p. 29 ff. Walter Rudolf, in his examination of »Wandel in den internationalen Beziehungen und das Gesandtschaftsrecht«, in *Festschrift U. Scheuner*, 1973, p. 493, 494, wrote: »While other matters of international law were increasingly drawn into the process of transformation, the law of diplomatic relations appears to be a rather stable element. Leaving aside exceptions ..., the interest of all States seems to prevail in the principle *ne impediatur legatio*«.

71 Scholars of international law have not contributed much to research on the origins of permanent diplomacy. This was criticised by Fritz Ernst, »Über Gesandtschaftswesen und Diplomatie an der Wende vom Mittelalter zur Neuzeit«, (1951) 33 Archiv für Kulturgeschichte 64, 69. The works of historians were of fundamental importance, especially Otto Krauske, »Die Entwicklung der ständigen Diplomatie vom 15. Jahrhundert bis zu den Beschlüssen von 1815 und 1818«, in G. Schmoller (ed.), *Staats- und Socialwissenschaftliche Forschung*, 1885, Vol. 5. In a critical discussion with him, there was also Adolf Schaube, »Zur Entstehungsgeschichte der ständigen Gesandtschaften«, (1889) 10 Mitteilungen des Inst. für öst. Geschichtsforschung 501. See also: Andreas, »Italien und die Anfänge der neuzeitlichen Diplomatie«, *op. cit.* (summarising and attempting a »synthetical progress«). The above-mentioned treatise by Fritz Ernst, with its outstanding evaluation of new sources and literature, stands out among these studies. An older work of enduring value is M. de Maulde-la Clavière, *La diplomatie au temps de Machiavel*, 1892-93.

72 »Hier bei uns erscheint sie als Sache des Misstrauens«. – Ernst, »Über Gesandtschaftswesen und Diplomatie«, *op cit.*, p. 77.

between those States which were linked particularly closely to one another. On the other, and at a later stage, the sending of permanent legations also occurred between potential adversaries. It was only at this stage that the new institution of permanent diplomacy was generally accepted.[73] It is rather difficult to decide precisely and unambiguously at which point this stage was reached, as there were many transitory phases. It is often difficult to decide whether a diplomat was an extraordinary plenipotentiary entrusted *ad hoc* with specified missions or a permanent representative of his sovereign equipped with a lasting and general mandate. In addition, there was no agreement as to whether the permanent legation was a higher level of the long-recognised institution of »special legation«, or whether it did not rather develop from the customary usage of semi-official agents, which finally acquired an official status.[74] Other authors would like to see the first instance of permanent diplomacy in the *procuratores* of the King of Aragon to the Papal Court, and yet others in the *consules* accredited by the Italian port-cities to the courts of Muslim rulers, who were more legates than consuls.[75] It appears most probable that the institutions of permanent diplomacy are derived from several different roots.[76] In any case there is general agreement in the new research that permanent diplomacy is a specific characteristic of the fully developed modern State, as it emerged at the beginning of the sixteenth century. Mattingly pointed to significant circumstances: that the establishment of a permanent diplomatic apparatus required a correspondingly established internal administrative structure and above all an efficient central authority responsible for the handling of foreign affairs, together with an orderly budget.[77]

The further development of permanent legations, from the early, especially Venetian, refinement and perfection of the institution to the high point of »classical diplomacy« in the time of Metternich and Talleyrand, as well as the consolidation of international legal rules on diplomatic immunity, privileges and exterritoriality, shaped a proportionate linear process. This was comparatively untouched by transformations of the State system and changes to the political groupings of States within that system. It remains an open question whether, after the serious breakdown of diplomatic immunity which has occurred since the end of the 1970s, this is also a valid prognosis for the future. There is no doubt that modern States, the modern law of nations and permanent diplomacy – all of which originated at the same time – essentially belong together and form a single part of modern history.

All of the following are closely linked: the growing extent of political contacts; the increasing interdependence of all changes to allocations of

73 *Ibid.*, p. 93.
74 See: G. Mattingly, *Renaissance Diplomacy* (2nd edn.), 1962, Chapters 6 &7.
75 Engel, *Kongress und Staatensystem*, Vol. 2 (*Zur Vorgeschichte der europäischen Völkerrechtsordnung. Lateinisches Abendland und Sarazenische Welt*) quoted by Janssen, *Anfänge des modernen Völkerrechts und der neuzeitlichen Diplomatie*, 1964, p. 77.
76 Janssen, *ibid.*, argued along similar lines.
77 G. Mattingly, *Renaissance Diplomacy* (2nd edn.), 1962, p. 223 ff.

power; the development of a State system regulated on the basis of the balance of power; the technical improvement of diplomatic interaction as a result of the transition from the customary use of *ad hoc* legations with specific mandates to the use of permanent legations having an organised and continuous manner of reporting and a mandate no longer limited to specific tasks of negotiation or representation; and, last but not least, the escalation of the overseas rivalries of the Great Powers and their efforts to protect their European system of order from disturbances in the balance of power originating outside Europe.

4. Legal Orders corresponding to Changes in the State System

At first, the development of the modern European State system led to a political order which was marked by the predominant position of power of Spain. The sixteenth century and the first half of the seventeenth century were characterised by this Spanish predominance and by the wars fought by the French, the Dutch and the English against the establishment of a Spanish universal monarchy. Around the middle of the seventeenth century a new order was established, one which was based on the rise of France to the position of leading European power. The battle against the ascendency of France during this period was led by the Habsburg Empire and Britain, which were themselves great powers. Britain emerged victorious at the beginning of the nineteenth century and during that century was the predominant power, not only in Europe, but world-wide. This position of global supremacy was shattered only by the First World War of 1914-18, a war which was directed against the rise of Germany to the rank of a world power and which resulted in Britain sharing its position of dominance with the United States.

Each of these three political systems, which are referred to here in an abbreviated fashion as the Spanish, the French, and the British system, produced its own unique, self-contained international legal order. The structure of each of these legal orders was determined by the particular intellectual and political style of the leading power of the time.

The international legal order of any particular period emerges out of the struggle between the political and international legal ideas and postulates of rival powers. The political and international legal programmes of the modern European States were all, however, expressions of ideologies of national expansion.[78] The stronger the leading position of the particular predominant power, the more that State marked the spiritual vision of the age, the more its ideas and concepts prevailed, the more it conferred general and absolute validity on expressions of its national expansionist ideology.

78 Janssen, *Anfänge des modernen Völkerrechts und der neuzeitlichen Diplomatie*, 1964, p. 8, commented that these ideas (already included in my publication of 1942, *supra*, note 3) meant nothing other than »that the theories of the eminent writers on international law were only the scholarly superstructure destined to legitimise the foreign policy of their own States«. This was a modification of my argument with which I cannot agree. My argument does not inevitably lead to such a consequence.

In this sense one can speak of a »Spanish«, a »French« and an »British« Age in the history of modern international law.

In using these terms the author of this book does not misunderstand the complex and stratified structural character of all modern systems of a law of nations. He does not intend to say, for instance, that the international legal order of the sixteenth century and the beginning of the seventeenth century was merely an instrument of Spanish policy. All the terms used were dialectical terms not intended to simplify in any way the complex circumstances to which they refer. The French, the Dutch and the English arguments were no less important to the international legal order of the Spanish Age than the Spanish ones, and their representatives were equally impressive. The most famous name in international law in the Spanish Age remains that of the Dutchman Hugo Grotius. It is, nevertheless, justified to call this epoch the »Spanish« Age of international law because the ideas held by the States which fought against Spain were not only marked by the colour of this age but also entangled in a polemical dependence on Spanish ideas and concepts. Grotius' famous treatise on the *Freedom of the Seas* is a classic example of this relationship.

The stamp of the leading power was clearly and recognisably imprinted upon the Spanish and British Ages of international law. The contours were not so sharply discernible in the French Age. This difference may be explained on the basis that the French policy of pure *raison d'Etat* and political interest renounced ideological reasoning and argumentation to a far greater extent than Spanish or British policy did, that it was far less dogmatically disposed and endeavoured to avoid rigid principles. The French arguments were, therefore, based extensively on State practice. At the height of the French Age France did not produce a single author suitable for inclusion in the *Classics of International Law*.[79]

All the international legal systems of modern times appeared under the classical name of *ius gentium* (law of nations), a term which had been carried over from the Romans. However, *ius gentium* in the Roman understanding was not a law of nations as we see it. It was the law applicable between Roman citizens and non-citizens in their mutual relations, and in the theory of the great Roman jurists the term was extended to mean the totality of legal norms common to all nations.[80] Only rarely was the *ius belli ac pacis* (law of war and peace) subsumed under the concept of *ius gentium*.[81] In line with the Roman tradition the conception of *ius gentium* as the entirety of legal norms common to all human beings was retained during the Middle Ages. Under the influence of Isidor of Seville, in particular, the law of nations (as we identify it) was included within this broa-

79 *Infra*, p. 351.

80 Paul Jörs & Leopold Wenger, *Geschichte und System des römischen Privatrechts* (Berlin, 1927) p. 40; G. Lombardi, *Ricerche in tema di ius gentium* (Milano, 1946); *idem*, *Sul concetto di ius gentium* (Rome, 1947).

81 Preiser in *Wörterbuch des Völkerrechts*, 1960, Vol. 3, p. 686.

der category,[82] which covered individuals, corporations, and sovereign bodies alike.[83]

In the course of modern development other, more precise terms which corresponded more accurately with the spirit of the respective, concrete international legal orders emerged alongside this intellectually imprecise collective denotation. At the same time these other terms brought a more precise intellectual expression to the subject.

This process of clarification of ideas originated in the Spanish Age. It is, fundamentally, the legacy of the great Spanish legal thinkers of this epoch.

It was Francisco de Vitoria who coined the term *ius inter gentes* (law between nations) in his lectures of 1532.[84] His contemporary, the Spanish jurist Fernando Vasquez, called the law of nations a »*ius inter principes del populos liberos*« (law between the rulers of free peoples). Francisco de Suárez, who elaborated upon the thoughts and doctrines of Vitoria, characterised the law of nations in one particular sense as »ius, quod omnes populi et gentes variae inter se servare debent« (law which all different peoples and nations should use between themselves).[85] Hugo Grotius wrote about a »ius inter civitates« (law between civilised nations) and a »ius quod inter populos plures aut populorem rectores intercedit« (law which regulates legal relations among different peoples according to the people).[86] In 1651 the English admiralty judge and law professor Richard Zouche adopted the term »ius inter gentes« as the title for his textbook, which is considered to be one of the great classics of international law.[87]

This notion of »ius inter gentes« was typical in the Spanish Age in so far as it expressed the struggle of the young independent discipline, still in the initial stage of its development, to bring more rigorous, precise concepts into the field. Until recently, credit had been attributed to Vitoria for having derived the exact notion of the law of nations »by extracting it from the idea of *ius gentium*, which includes a number of different legal areas«.[88]

82 See: *infra*, p. 85 ff.

83 Janssen, *Anfänge des modernen Völkerrechts und der neuzeitlichen Diplomatie*, 1964, p. 11. Following Max Kaser, *Ius gentium* (Cologne, 1993) (Vol. 40, Forschungen zum römischen Recht), see recently K.H. Ziegler, »Ius gentium als Völkerrecht in der Spätantike«, in *Collato Iuris Romani, Etudes dédiées à Hans Ankum*, 1995.

84 »Quod naturalis ratio inter omnes gentes constituit, vocatur ius gentium«. – *De Indis et De Iure Belli*, Vol. 3, 1. See: *Classics of International Law*, Vol. 6, 1917.

85 *De legibus ac Deo legislatore*, Vol. 2, ch. 19, 8. In *Classics of International Law*, 1944.

86 *De jure belli ac pacis*, Prol., s. 1. In *Classics of International Law*, Vol. 3, 1925.

87 The complete title reads: *Iuris et iudicii fecialis sive iuris inter gentes et quaestionum de eodem explicatio, quaeque ad pacem et bellum inter diversos principes aut populos spectant ex praecipuis historico iure peritis exhibentur.* In *Classics of International Law*, Vol. 1, 1911.

88 »Dass er aus dem Begriffe des ius gentium, das verschiedene Rechtsgebiete umfasste, das ius inter gentes herausgeschält hat«. – Verdross, *Völkerrecht*, 1937, p. 43. The first author to advance this thesis was Ernest Nys, *Les origines du droit international*, 1894, p. 11. Numerous others took it further: J. Barthélemy, »François de Vitoria«, in *Les Fondateurs du Droit International*, 1904, p. 1, 7 ff.; James Brown Scott, *The Spanish Origin of International Law*, 1934; Jean Baumel, *Le droit international*

Lately, this view has been contested. Several authors have pointed out that this interpretation relies on an erroneous translation of a crucial passage in Vitoria's work. Vitoria had modified the famous definition from the *Institutions* of Gaius: whereas the Roman jurist had said »Quod naturalis ratio inter omnes homines constituit, vocatur ius gentium« (That which constitutes natural reason amongst all men, is called the law of nations), Vitoria substituted the words »inter omnes homines« with »inter omnes gentes«. According to Vitoria's critics the correct translation of Gaius' words was not »between all nations« but »amongst all nations«. It did not, therefore, support the concept of a law between States.[89]

Although other authors have continued to interpret Vitoria's »ius inter gentes« in the sense of a genuine international legal concept,[90] strong doubts remain as to whether the alternative clarification was in fact correct. No doubt of this kind can exist with respect to Francisco de Suárez. He clearly understood the double meaning of the Roman *ius gentium* and made a precise distinction between *ius gentium inter se* (i.e. international law) and *ius gentium intra se* (i.e. national law rules, mainly civil in character, that in corresponding or similar forms are found within all States).[91] What is contested is whether Suárez intended »to expel the individual human being from the realm of the *ius gentium proprissime dictum*«,[92] or whether this last step to a law applicable exclusively between States remained reserved to the theorists of the eighteenth century, and principally Hobbes and Pufendorf.[93]

public, la découverte de l'Amérique et les théories de François de Vitoria (Montpellier, 1931), p. 205.; Hubert Beuve-Méry, *La théorie des pouvoirs publics d'après François de Vitoria et ses rapports avec le droit contemporain* (Paris, 1928), p. 79.; Peter Tischleder, »Die Bedeutung des Franciscus von Vitoria für die Wissenschaft des Völkerrechts«, in *Festschrift J. Mausbach* (Münster, 1931), p. 93.; Friedrich August von der Heydte, »Franciscus de Vitoria und sein Völkerrecht«, (1933) 13 Zeitschrift für öffentliches Recht 251.

89 J. Höffner, *Kolonialismus und Evangelium* (2nd edn.) (Trier, 1969), p. 314. See, for the same conclusion: J. Soder, *Die Idee der Völkergemeinschaft*, 1955, p. 123 ff., 127 ff.; *idem.*, *Francisco Suarez und das Völkerrecht* 1973, p. 65; *idem.*, introduction in *Klassiker des Völkerrechts*, Vol. 4, 1965, p. 13; A. de La Pradelle, *Maitres et Doctrines du Droit des Gens* (2nd edn.), 1950, p. 43 ff.; Janssen, *Anfänge des modernen Völkerrechts und der neuzeitlichen Diplomatie*, 1964, p. 11.

90 Hadrossek, introduction in *Klassiker des Völkerrechts*, Vol. 2, 1952, p. xx; F. Dickmann, *Friedensrecht und Friedenssicherung*, 1971, p. 122; A. Truyol y Serra, »Die Grundlagen der völkerrechtlichen Ordnung nach den spanischen Völkerrechtsklassikern«, (1958) 2 Heidelb. Jahrbuch 53, 62.

91 Soder, *Francisco Suárez und das Völkerrecht*, 1973, p. 213 ff.

92 Janssen, *Anfänge des modernen Völkerrechts und der neuzeitlichen Diplomatie*, 1964, p. 57.

93 Scheuner, »Die grossen Friedensschlüsse als Grundlage der europäischen Staateordnung zwischen 1648 und 1815«, in *Spiegel der Geschichte, Festgabe für M. Braubach*, 1964, 220, 225 ff. In any event, Engel's contention – that the reduction of »international law« to an interstate *jus inter gentes* »only developed with the end of the undisputed validity of ›classical‹ international law at the end of the eighteenth and the beginning of the nineteeth century« seems incorrect. See: Engel, »Von der spätmittelalterlichen res publica christiana zum Mächte-Europa der Neuzeit«, in *Handbuch der Europäischen Geschichte*, Vol. 3, 1971, p. 307, 362.

It is therefore safe to say that a clearer and more precise conception of the character of an international legal order gradually evolved out of the theoretical endeavours of the Spanish Age, and that this development was reflected in the term *ius inter gentes*.

At the same time, the linguistic proximity of these new designations to the old *ius gentium* brought a close spiritual association to the term *ius inter gentes*, a term which jurists of the Spanish Age, despite their new perspective, still associated with the intellectual milieu of the Medieval legal order. It is therefore justified to identify the law of nations of the Spanish Age with this idea of the *ius inter gentes*, which the scholars of the period themselves applied.

The French Age also produced its own characteristic term for the idea of a law of nations. In the eighteenth century the expression *Droit public de l'Europe* (European public law) came into general use.[94] In 1748 Abbé Gabriel Bonnot de Mably published an outline of the positive law of treaties entitled *Le droit public de l'Europe fondé sur les traités* (The Public Law of Europe Based on the Treaties). This work was highly valued by diplomats of the eighteenth century. Two years earlier the Spanish writer Abreu had published a book entitled *Derecho Público de la Europa* (Public Law of Europe). In 1732 the Swabian author Johann Jakob Moser produced *Anfangsgründe der Wissenschaft von der heutigen Staatsverfassung von Europa und dem unter den europäischen Potenzen üblichen Völker- und allgemeinen Staatsrechts* (A First Basis for the Study of the Current Constitution of States of Europe and European Customary Law of Nations and Common National Law). Moser's famous works *Grundsätze des jetzt üblichen europäischen Völkerrechts in Friedenszeiten* (Basic Propositions on Current European Customary Law of Nations in Time of Peace) and *Erste Grundlehren des jetzigen europäischen Völkerrechts* (First Basic Theories of the Current European Law of Nations) followed in 1750 and 1778, respectively. G. Achenwall, a professor in Göttingen, wrote a book which remained incomplete at his death: *Iuris gentium Europae practici primae lineae* (Introduction to the European Customary Law of Nations) (1772). J.J. Neyron, a refugee from Brandenburg, published *Principes du droit des gens européen conventionnel et coutumier* (Principles of Conventional and Customary European Law of Nations) in 1783, while the Saxon judge C.G. Günther produced *Grundriss eines europäischen Völkerrechts* (Outline of a European Law of Nations) in 1787 and 1792. In 1785, Georg Friedrich von Martens named the first edition of his famous treatise on this kind of law *Primae lineae iuris gentium*

94 See: the chapter on »The Public Law of Europe and the Old Colonial System« in J. Goebel, *The Struggle for the Falkland Islands*, 1927, p. 120 ff.; E. Reibstein, »Das «Europäische Öffentliche Recht» 1648-1815«, (1959/60) 8 Archiv des Völkerrechts 385; and Scheuner, »Die grossen Friedensschlüsse als Grundlage der europäischen Staatenordnung zwischen 1648 und 1815«, *op cit.* p. 232 ff.; A. Truyol y Serra, *Die Entstehung der Weltstaatengesellschaft unserer Zeit*, 1963, pp. 44 & 70. Guggenheim was alone in thinking that this conception was a »fiction« (See: »Das ius publicum europaeum und Europa«, (1954) 3 Jahrbuch des öffentlichen Rechts 1, 4). On the character of the *droit public de l'Europe*, see: *infra*, p. 287 ff.

Europaerum practici (Introduction to the European Customary Law of Nations).[95]

The international legal order of the Spanish Age certainly became no less »European«, just as that of the French Age became no less »Christian«. It was nevertheless significant for the spiritual climate of both ages that conceptions marked by the Christian law of nature had been relaxed to such a degree during the eighteenth century that it was decided to create a completely new name for the international legal system, a name which clearly expressed the character of a legal order between European powers. Mably's concept of a »Droit public de l'Europe« was exactly to the point. For this particular law had taken up many principles, rules and customs which were previously not included, and which later were once again excluded. Among these were dynastic succession orders and marriage contracts, courtly conventions and political maxims. Only in this age was the »European balance of power« regarded as a binding legal principle.[96] Indeed, all of these rules fit better under the wider and more general concept of a »European public law«.[97]

An essential role was played in this development by the close interweaving of the internal constitutional law of the dissolving Holy Roman Empire of Germanic nations with the international law of the European powers – an interweaving which resulted from the Peace of Westphalia. With respect to this situation the eminent British historian Henry Hallam remarked, in 1818, »that international law was at first taught in Germany where it was a product of the public law of the Reich«.[98] Although the Germans were not the first teachers of international law, it is true that in the French Age it was principally German authors who determined the character of the literature on the law of nations and brought authority to the concept of a »European Public law«.

Strikingly, the legal order of the nineteenth century (the British century) was designated as »international law«, rather than the »law of nations«. The term was coined by Jeremy Bentham in 1789 and gained ground, first in the Anglo-Saxon sphere,[99] and then over the course of the nineteenth century in continental European literature as well.[100]

95 A French edition appeared in 1788 under the title *Précis du droit des gens moderne de l'Europe*; a German edition appeared in 1796 under the title *Einleitung in das positive europäische Völkerrecht, auf Verträge und Herkommen gegründet.*

96 J. von Elbe, »Die Wiederherstellung der Gleichgewichtsordnung in Europa durch den Wiener Kongress«, (1934) 4 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 226.

97 Grewe, »Vom europäischen zum universellen Völkerrecht«, (1982) 42 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 449, 461 ff.

98 H. Hallam, *The View of the State of Europe during the Middle Ages*, 1818, Vol. 1.

99 Bentham, *Principles of International Law*, 1789. The term »International Law« was used, to name just a few examples, by: Henry Wheaton, *Elements of International Law*, 2 Vols., 1836; Sir Robert Phillimore, *Commentaries upon International Law*, 4 Vols. (London, 1854-61); Richard Wildmann, *Institutes of International Law*, 1850; Henry Wager Halleck, *Elements of International Law and Laws of War* (Philadelphia, 1866); Theodor Dwight Woolsey, *Introduction to the Study of International Law*, 1860;

This terminology accurately reflected the world-wide British policy during the nineteenth century to extend European public law into a universal international law. As a result of Britain's influence, this expansion was achieved.

The term »international law« was retained after the First World War (during a period in which the British position of world dominance was loosened through a division of this pre-dominance between the two Anglo-Saxon powers), and even after the Second World War. Yet one should not be deluded by this fact into ignoring the abrupt transformation which occurred at this point in the historical development of international law. This transformation is not normally taken into account, as a result of the fact that an appropriate new name has not been found which could have facilitated the distinction between »classical« and »post-classical« international law.

5. The Method of Analysis Followed in this Book

The method which is followed in this book for demarcating the epochs of the history of international law, for fixing the major turning points and for indicating the types of international legal orders that have been constructed in the different epochs, is not the only possible, satisfactory assessment of events. It bears repeating that it was not the author's intention to write a complete history of international law but merely to provide a necessary foundation for such a complete history. If a single, cohesive international legal order and interrelated epochs may be found in the course of modern history – and this author believes that this working hypothesis is consistently borne out by the results of his work – then it must also be possible to determine the shape and historical locations of this single cohesive order by examining a series of specific problems. The following examination is therefore based on the selection and investigation of a series of questions that are significant for the determination of the legal, political and cultural historical structure of each epoch and each international legal order.[101] As this

William Edward Hall, *A Treatise on International Law* (London, 1880); Sir Henry James Sumner Maine, *International Law* (London, 1888); John Westlake, *International Law*, 2 Vols. (Cambridge, 1904-07); Lassa Oppenheim, *International Law* (London, 1905); and James Lorimers *Institutes of the Law of Nations* (Edinburgh & London, 1883/84), which was published by Ernest Nys in a French translation under the title *Principes de droit international* (Brussels, 1883).

100 A comprehensive survey of continental European, Anglo-American and Latin American literature from this perspective was presented by Truyol y Serra in *Der Wandel der Staatenwelt in neuerer Zeit im Spiegel der Völkerrechtsliteratur des 19. und 20. Jahrhunderts*, 1968.

101 On »models« and »systems« of international law as methodological points of orientation for a comparative history of international law, see: Schwarzenberger«,Historical Models of International Law: Towards a Comparative History of International Law«, in W. Butler (ed.) *International Law in Comparative Perspective*, 1980, p. 227; as well as, Connelly, »The History of International Law: a Comparative Approach«, in Butler (ed.), *ibid.*, p. 251.

examination adopts as its point of departure the working hypothesis of a necessary correlation between the State system and international law, its framework has been predetermined by the epochs of the general history of the State system.

The short historical summary that stands before each of this book's six parts serves the purpose of delimiting the historical framework with which each part is concerned. The author, in his description of the political structures of the Medieval world, adopted the basic points set out by Heinrich Mitteis in *Staat des hohen Mittelalters* (State of the High Middle Ages).[102] He drew upon Otto Brunner's *Land und Herrshaft* (Country and Dominion) for specialised terms which recognise the conditional historical and constitutional peculiarity of Medieval international law.[103] In taking the segmented modern history of international law as a basis for his periodisation of all general political history he relied on the fundamental conclusions set out by Wolfgang Windelband in *Die Auswärtige Politik der Grossmächte* (The Foreign Policies of the Great Powers).[104] The author is thankful for the works of Adolf Rein, from which he derived important insights into the significance of overseas expansion for the European State system and the historical emergence of the world State system.[105] A different picture of the »epochs of modern history« was provided by Werner Näf in his comprehensive examination of the Middle Ages and modern times up to the Second World War, which he referred to as »the eve of the present day«.[106] The author confesses that all of these works provided valuable suggestions and references concerning general historical foundations for his specialised history of ideas about international law.

The questions, all of which will be put to the test in this book's determination of the relationship between the different epochs and systems, may be gathered from the table of contents. Any expansion of the scope of the questions could only serve as additional experimental safety-coefficients. The substantive grouping of the questions and their positioning was guided by the goal of identifying the specific points of structural importance.

The first of these points concerns the delimitation of the international legal community, that is to say the determination of its intellectual substance, its socio-cultural structure, and its geographical scope. Each legal order will fundamentally be determined through the composition of the legal community from which it is derived and for which it is of value. The first and, in a word, decisive questions about every international legal order are whether the international legal community is the community of occi-

102 Mitteis, *Der Staat des hohen Mittelalters*, 1940.
103 Brunner, *Land und Herrschaft* (4th edn.), 1956.
104 W. Windelband, *Die Auswärtige Politik der Grossmächte* (3rd edn.), 1936.
105 A. Rein, *Der Kampf Westeuropas um Nordamerika im 15. und 16. Jahrhundert*, 1925; *idem*, »Über die Bedeutung der überseeischen Ausdehnung für das europäische Staatensystem«, (1928) 137 Historische Zeitschrift 28; *idem*, *Die europäische Ausbreitung über die Erde*, 1931.
106 »Vorabend der Gegenwart« W. Näf, *Die Epochen der neueren Geschichte. Staat und Staatengemeinschaft vom Ausgang des Mittelalters bis zur Gegenwart*, 2 Vols. (Aarau, 1945).

dental »Christendom«, or a community of »civilised« nations, or a universal community of mankind without substance; and whether the scope of validity of the international legal order is limited to the European continent or whether its principles and institutions are equally applicable to colonial or semi-colonial territories outside Europe.

The »structurally important« question of the essential characteristics of the members of the international legal community must rank second in the order of importance. Which physical or moral persons (understood in the sense of the *personne morale* of French legal theory) are legitimate, both to act as legally and actually capable subjects of the legal order and to hold rights and obligations in the international community? It is of far-reaching importance whether only »sovereign« States as such, or also individuals and groups within States, are regarded as subjects of international law, and whether these States are absolutist territorial States, liberal-democratic nation-States, or ideologically characterised empires extending across entire continents. Closely connected therewith is the question of how far the full responsibility of the subjects of international law and the control of the international legal community reaches, whether there is an »intervention free« area of »particular concern«, a *domaine réservé*, subject to the exclusive competence of each full member of the international legal community, or whether there are certain grounds that provide legal justification for an individual intervention by another power or for a collective intervention by the international legal community. The decision in favour of one or other alternative and the nature of the accepted grounds for intervention (which may be religious, political or humanitarian and which alternate with one another over the course of history) are constitutive elements of each international legal order. The legal conditions for the admission of new members to the international legal community as well as those for the identification of new subjects of international law are both indicators of whether the identified structural characteristics form the picture of a coherent system. If this is the case, the substantial characteristics of the international legal community and the criteria of international legal personality must be reflected by the requirements for recognition.

A third essential feature of each international legal order is its stage of constitutional development, whether an »organised« community exists, and how powers are divided within that community. In this context the central questions are: how is the creation of law provided for, from which sources is the law seen to flow, and which organs are entrusted with its codification into positive legal rules? Further questions concern, to whom the application of the law is entrusted, and whether there are arbitral tribunals dependent on the sovereign will of the State or even a binding international judicature. Lastly, there is the fateful question which faces each international legal order: in which hands is the executive power for the enforcement of international law concentrated? This question is most relevant in respect of the fundamental problem of the international legal conception of war. Does international law give each sovereign State the right to wage war freely for the purpose of enforcing its real or supposed rights, or does it permit war only as a means of self-defence, or as a penalty against the »aggressor«?

Does it »outlaw« war as an instrument of national policy and reserve the right to wage war to an international authority, to be applied as a collective »sanction«?

From these questions there follows a further question, whether the concept of neutrality is recognised, or whether a failure to perform higher international duties will be condemned.

The decisive question, which is inherent in the problem of the international legal concept of war, of whether the international legal order reaches its zenith in a pluralism of independent sovereign powers, or whether it recognises a higher authority above all States and nations, gives rise to a further question which will be examined in this book. In short, which legal institutions were available for the demarcation and distribution of territory in the international legal systems of the different epochs? In the early stages of the classical Age of Discovery the problem of the distribution of colonial territories was faced by the European powers. During the transition from the fifteenth to the sixteenth centuries the same problem reanimated the Medieval conception of the universal international legal authority of the Pope, which was concretely expressed in the principle of the demarcation of the Spanish and Portuguese zones of discovery. The nineteenth century produced the most radical antithesis to this conception. The principle of effective occupation not only delivered the territorial order of the globe to the pluralism of sovereign States, but also provided the most radical antithesis to principles of demarcation which were defined by considerations of justice by basing all demarcations merely on effective occupation. An equally radical antithesis resulted from the development of alternative possibilities and legal principles for organising the seas in modern international legal history, and led to the famous argument between *mare liberum* and *mare clausum.*

In the attempt to organise the wealth of legal historical material extracted from this series of questions into coherent systems of legal order, it must not be overlooked that a legal order is not primarily a logical system of precisely interacting rules without gaps and contradictions. It is much more the normative image of a natural state of order. The totality of diverse legal rules deserves to be called a legal order if it deals with the totality of facts needing to be regulated legally in a manner which corresponds to the specific intellectual, cultural, social and political situation in question and which establishes directions for existing in this situation. In other words, the principal context in which individual legal rules and institutions are found is not logical, but rather morphological. It is the subsequent task of jurisprudence to build systems and co-ordinate concepts. That it is only in times of methodological confusion that this task may be mistaken need only be remarked upon here.

If this methodological approach is valid for systems of national law, it is all the more justifiable for the international legal order with its much more complicated theoretical foundation. The author endeavoured to resist the temptation of selecting from the mass of material only those facts which fit into the scheme of his working hypothesis and contributed to a solid, logical structure. He also attempted to throw light on such important facts and

ideas as seemed to resist his interpretation. However, if this interpretation was more than just a bold construction, it would inevitably collide with some of those seemingly absurd facts of life which appear time and again in history. In so far as his conception is not an artificial one, its final results will not be affected in this way.

Part One

Ius gentium

The Structure of the Law of the Nations during the Middle Ages

Figure 1: Papal approbation of the Emperor? The coronation of Karl the Great as Roman Emperor by Pope Leo III on 25 December 800. (Grandes Chronique de France).

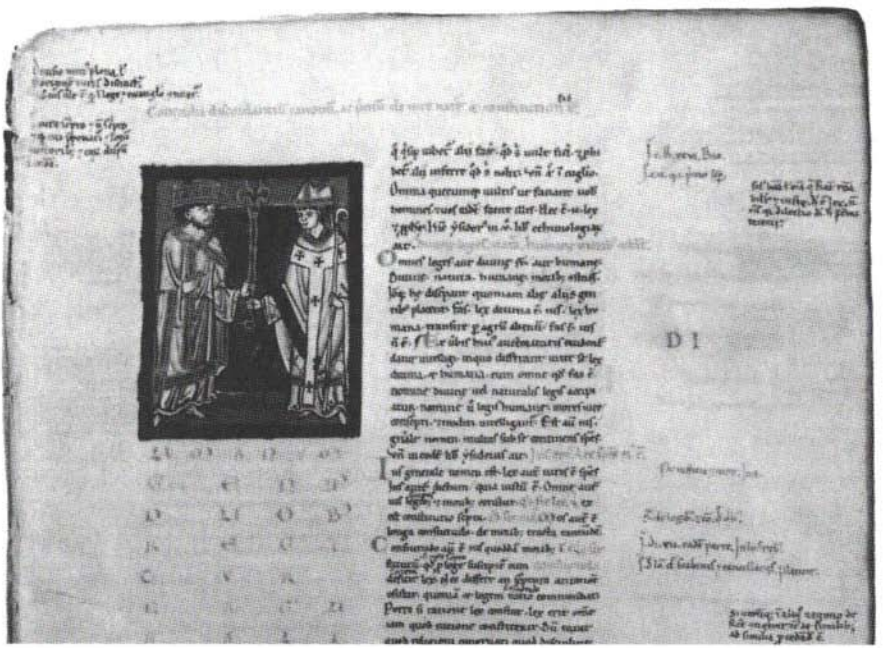

Figure 2: Secular ruler and ecclesiastical leader carrying the lily-sceptre between them: the two »ministeria« of Cristendom. (Decretum Gratiani).

Chapter One

Unity and Subdivision of the Occident under the Dyarchy of Emperor and Pope

I. The Structure of Political Forces

The medieval world had neither States nor a State system in the modern sense of these terms.[1] This fact is an essential, basic point of departure for developing conceptions about the medieval law of nations, as well as about the substantially different international law of modern times. First, it explains why, in the historical context of the Middle Ages, one is confronted with political facts and forces which are fundamentally different from those which have driven modern State history. The bodies politic of the Middle Ages were not »States« in the modern sense of the word. Although recent research has attempted to identify »early forms of the modern State in the late Middle Ages«,[2] the basic validity of this point of departure remains unshaken. The transfer of the concept of »State«, and of the entire terminology which is necessarily linked with this concept, to medieval circumstances involves many risks of misunderstanding and erroneous interpretation. For this reason, this book generally complies with the postulates which have been advanced in the recent research of German scholars[3] and avoids the

1 See: *supra*, p. 8; *infra*, p. 61 ff.

2 »Frühformen des modernen Staates im Spätmittelalter«. This is the title of a treatise by Werner Näf, (1951) 17 Historische Zeitschrift 225, which is of fundamental importance to this thesis. For a critique see: H. Quaritsch, *Staat und Souveranität*, 1970, Vol. 1, p. 74 ff., 187.

3 In his book *Land und Herrschaft* (Country and Dominion) (4th edn.), 1956, which became representative of this trend in research, Otto Brunner stated (at 193; see also p. 132 ff.): »One has to attempt a description of the inner structure of the medieval political communities which is more than a system of positive public law. This attempt must not avoid providing a definition of the legal nature of those communities, nor limit itself to recognising as a constitution only those legal institutions, which today have their place in national law, and ignoring those which are generally dealt with in penal or civil law. What is required is a description of the construction of those communities which takes into account the fact that the essential elements of the modern State concept did not exist for the medieval bodies politic, and which does not therefore regard them as ›private‹ or as ›society‹. In order to be correct, such a description must observe two requirements. First, the terminology it uses must be taken from the sources themselves, so that these sources can be interpreted correctly with the help of these concepts. Second, and most importantly, once the communities have been described in this way, they must be understood with regard to their actual interactions. A description of the medieval order will only be correct, if it provides an understanding of medieval politics«. (Es muss der Versuch einer Darstellung des inneren Baues

term »medieval State«.[4] The structure of medieval political communities will be discussed later.[5]

It also follows from the first sentence above that fields of political gravitation in the medieval world did not at that stage operate with the intense and comprehensive correlation which is characteristic of the modern State system.[6] Thus, the medieval political system did not conceive of the balance of power; a principle which, subsequent to its development in the fifteenth century, became an essential regulatory element in the interplay of States in the modern world. If the modern State system, the substratum which supported the development of modern international law, did not yet exist in the Middle Ages, which system of correlation regulated interactions between medieval political communities? Could a legal order worthy of the name »law of nations« develop at all on this foundation?

der politischen Verbände des Mittelalters gemacht werden, die mehr ist als ein System des positiven Staatsrechtes und die dabei doch nicht auf die Darstellung der Rechtsnatur dieser Verbände verzichtet, die sich nicht darauf beschränkt, als Verfassung nur jene Rechtsinstitute anzuerkennen, die heute ihren Platz im Staatsrecht haben, und andere beiseite lässt, weil sie gemeinhin etwa im Strafrecht oder Privatrecht behandelt werden. Es geht um eine Darstellung des Baues dieser Verbände, die sich bewusst ist, dass wesentliche Begriffsmerkmale des neuzeitlichen Staates den mittelalterlichen Verbänden fehlen, und die sie darum doch nicht als »privat« oder als »Gesellschaft« betrachtet. Soll eine solche Lehre richtig sein, werden von ihr zwei Dinge gefordert werden müssen. Erstens, dass die Terminologie, die sie verwendet, den Quellen selbst entnommen sei, so dass der Sinn dieser Quellen mit Hilfe dieser Begriffe richtig gedeutet werden kann. Dann zweitens aber – und das ist das Entscheidende -, dass die so beschriebenen Verbände in ihrem tatsächlichen Handeln begriffen werden können. Eine Darstellung der mittelalterlichen Ordnungen wird nur richtig sein, wenn daraus zugleich die mittelalterliche Politik verstanden werden kann.)

4 The concept of »State« is used in respect of the Middle Ages by G. von Below, *Der deutsche Staat des Mittelalters*, 2 Vols., 1925; F. Keutgen, *Der deutsche Staat des Mittelalters*, 1918; A. Dopsch, *Der deutsche Staat des Mittelalters*, 1915 (Mitteilungen des österreichischen Instituts für Geschichtsforschung 36); *Idem*, *Beiträge zur Sozial- und Wirtschaftsgeschichte*, 1938, p. 187 ff.; H. Mitteis, *Lehnrecht und Staatsgewalt*, 1933; *Idem*, *Der Staat des hohen Mittelalters*, 1940; H. Heimpel, »Reich und Staat im deutschen Mittelalter«, in *Deutsches Mittalter*, 1941, p. 50; T. Mayer, »Die Ausbildung der Grundlagen des modernen deutschen Staates im hohen Mittelalter«, (1939) Historische Zeitschrift 159; G. Tellenbach, »Vom Zusammenleben der abendländischen Völker im Mittelalter«, in *Festschrift G. Ritter*, 1950, p. 1, 44. Anglo-American authors generally do not shrink from using the term »State« for medieval communities.

5 *Infra*, pp. 61 ff.

6 For recent trends in the efforts of historical research to identify a State system in the late Middle Ages see: *supra*, pp. 61 ff.

II. The »Middle Ages« and the Stages of Their Legal Development

The term »Middle Ages« will be used in this book to designate the epoch of cultural history that began with the establishment of Germanic realms on the territory of the Roman Empire and ended with the initial phases of the Renaissance and Reformation.[7] It is obvious that it is not possible to form a coherent and uniform picture of the legal order of such an extended epoch, which stretched from the fifth century until the end of the fifteenth. Nevertheless, this period displayed certain homogeneous features, which, at its peak, merged to form a relatively coherent picture of an occidental cultural community, under the political and ecclesiastical umbrella of Pope and Empire.

The legal order of these »High Middle Ages«, extending from the beginning of the tenth century through to the middle of the thirteenth century, represented, in its cultural configuration, the purest and most developed incarnation of medieval thought. It must be the focus of all of our endeavours to understand the medieval foundations and origins of modern international law. For it was only after the decline and fall of the Carolingian Empire that the alleged bases of international legal thought, which had developed in the Early Middle Ages, could fully evolve. By the fourteenth and fifteenth centuries legal concepts were already combining the »demise

7 Compare P. Kirn, »Der Begriff Mittelalter«, *Propyläen Weltgeschichte*, Vol. 3, p. 3. As Kirn emphasised, the limits of an epoch cannot of course be fixed by precise dates. One has to envisage transitional periods of a certain length. In line with this consideration, there has been frequent discussion in recent research of a »threshold period«, which was fixed between 1450 and 1500. Dates such as Gutenberg's invention of the printing press (1450), the fall of Constantinople (1453) or for some, even the beginning of Luther's Reformation (1517) served as points of orientation. For many scholars the limits between the Middle Ages and modern times, which have long been taken for granted, appear more and more blurred. Oscar Halecki, the Polish-born American historian, pleaded for the insertion of a separate transitional period of the »Renaissance« between the Middle Ages and modern times, such that the end of the Middle Ages would readily be located during the second half of the fourteenth century, whereas the initial stage of modern times would fall in the second half of the sixteenth century. (*Europa – Grenzen und Gliederung seiner Geschichte*, 1957, p. 134 ff.).

For the purposes of this book the classical periodisation can and must be retained. (For literature on the debate, see: Engel, »Von der spätmittelalterlichen res publia christiana zum Mächte-Europa der Neuzeit«, in *Handbuch der europäischen Geschichte*, Vol. 3, p. 8 ff.). If in subsequent chapters specific dates are mentioned, they are to be understood as points of orientation for calculating the limits of transition periods. In this sense the date of 476 A.D., (the fall of the Western Roman Empire – a date which was dismissed as irrelevant by Kirn), can be regarded as a starting point for an analysis of the history of international law. The years 1492-1494, that is the discovery of America and the French invasion of northern Italy, can serve as points of orientation for the end of this epoch. (For an argument that this was also the date of the emergence of the modern State system, see: *supra*, p. 163 ff.).

of over-ripened cultural forms«[8] with new formal elements originating from the spirit of the Renaissance. These late medieval legal conceptions, with their strong inclination towards universalism, were adopted by the Spanish at the dawn of the Modern Age. It should thus be emphasised, in contrast to current thinking on the course of this intellectual heritage, that the Spanish thinkers were not heirs of the true medieval spirit, but only of its very late incarnation.

Although it is important to subdivide the medieval cultural historical epoch into different parts, and although it would be misguided to seek to derive the character of the medieval legal order from specific institutions and legal principles of the fourteenth or fifteenth centuries,[9] in this introductory section a detailed horizontal subdivision into the Early, High and Late Middle Ages will not be undertaken. In contrast to the organisation of subsequent chapters, no cross-sectioning into different periods will be attempted here. Instead, this chapter seeks to provide an overview of the growth of legal institutions and conceptions during the Middle Ages as a whole.

III. The Unity of Church and Empire and the Two Ministeria

The Early Middle Ages was the period in which Germanic tribal realms appeared on Roman territory.[10] All that was contained in international legal thought was incorporated in the works of the great religious teachers. The two most important sources of early medieval thought on the law of nations were the *Civitas Dei* of Aurelius Augustinus (354-430) and the *Etymologiae* of Isidor of Seville (560-636). Their ideas were too far removed from matters of this world to be explained by existing political structures.

It was at the end of this period, during the ninth century, and against the comprehensive cultural historical background of the encounter of Germanic and Christian worlds on Roman territory, that two powers crystallised which determined the political face of the High Middle Ages. These powers were the Empire and the Papacy. The coronation of Charlemagne in Rome, on Christmas Eve of the year 800, symbolised the principle of *unitas ecclesia*, the unity of the Church and Empire and the mutual interdependence of the two supreme authorities or ministeria. Alcuin, Charlemagne's court theologian, used the »doctrine of the two swords« to illustrate this conception of the unity of the *corpus christianum* and the co-ordination of its two ministeria, Empire and Papacy, on the basis of their equal rights. This doctrine later provided the framework for claims of supremacy by both sides.

8 »Ableben überreifer Kulturformen« – J. Huizinga, *Herbst des Mittelalters* (5th edn.), 1939, p. V.

9 This happens repeatedly, and the author confesses to having erred in this respect himself – in his preparatory study »Res Publica Christiana, Vom Wesen der mittelalterlichen Völkerrechtsordnung«, (1940) 16 Europäische Revue 594.

10 See: G. Schnürer, *Die Anfänge der abendländischen Völkergemeinschaft*, 1932.

The order of political and spiritual authority was embodied and preserved in the coronation rites, which also represented the concrete political philosophy of the time. According to this conception, the universal church was the body of Christ, the limbs of which performed various functions. Christ thus encapsulated two supreme office holders, namely the *persona sacerdotalis* and the *persona regalis*, as they were called in a capitulary written by Louis the Pious in 829.[11]

The great struggle between Emperor and Pope which dominated the High Middle Ages and reached its peak in the investiture conflict of 1060-1130, centred around deviations from this fundamental conception of a dyarchy of Emperor and Pope, as understood in either a spiritual or secular sense. Pope Nicholas I (858-867) appears to have been the first prominent protagonist of claims for spiritual priority. His papacy saw the emergence of the notorious clerical forgeries, which were decisively to influence the development of medieval canon law: the *Capitula Angilramni*, which was a compilation of »capitularia« by Benedictus Levita, and above all the *Pseudo-Idisorian Decretals*, which comprised, amongst others, the immensely important *Donation of Constantine*. This was a forgery fabricated around the year 816 in St. Denis, according to which Constantine the Great had, on moving the capital of his empire to the east, conveyed a considerable number of secular rights of dominion upon Pope Silvester I. These rights were all listed in detail.[12]

Such claims had little real political significance during the entire reign of the Saxon Emperors (919-1024) and beyond, for the position of the Holy See was highly unstable as a result of the pressures imposed on it by the Roman nobility and the increasing secularisation of clerics in all countries.

It was during the Ottonian renovation of the Empire (962), that the specific idea of the Roman-German Empire crystallised. It did not, in a direct political sense, seek dominion over the world (*dominium mundi*), or over the Occident or the *Imperium*. The idea of a *dominium mundi* had already been abandoned by Charlemagne when he was obliged to recognise the parallel existence of the Byzantine Empire. Under the Saxon and Salic Emperors a claim of dominion over the Occident was similarly out of the question.[13] The Emperors never claimed a sovereign dominion over the Kings of France. Likewise, the idea of the Empire was not identical to that of dominion over the *Imperium*, that is the territories of Germany, Italy and Burgundy.[14] The German King was also ruler in the Italian and Burgundian Kingdoms without being Emperor.[15] Accordingly, the Empire, which the

11 On this point, see: A. Dempf, *Sacrum Imperium*, 1929, p. 147 ff.

12 M. Buchner, *Das Vizepapsttum des Abtes von St. Denis*, 1928.

13 H. Löwe, »Kaisertum und Abendland in ottonischer und frühsalischer Zeit«, (1963) 196 Historische Zeitschrift 529.

14 Edmund Stengel, *Regnum und Imperium. Engeres und weiteres Staatsgebiet im alten Reich*, 1930, has demonstrated that in medieval linguistic usage the term »Imperium« was understood to mean the territories of Germany, Italy and Burgundy, whereas the German Kingdom was called »Regnum«.

German King Otto I acquired as a result of his coronation, did not automatically equate with governance over its entire territory; it was much more of a sacred office of a specific kind. Its substance was essentially the protectorship over Church and Christendom, which was inseparably linked with the mandate to convert the Eastern heathen world.[16] In other words, it was: »Defender of the faith, for the purity of the Church in its head and limbs, and care for the order of the world according to the will of God«.[17]

Centuries later Alexander von Roes, resuming the Ottonian-Salic tradition, called the Empire a secular ecclesiastical office, a *Regnum ecclesiae Romanae*, the »almost autonomous power of the sword, protecting the Christian faith and the Church against the heathen and heretics«.[18] This mission, which was imposed upon the Empire, required influence upon the occupant of the Holy See, which in turn depended on the actual governance of the Emperor in Rome and his creation of a state of order in Italy. Governance in Rome, together with order and peace-keeping in Italy, have always been constitutive elements of the imperial idea. This characterisation, which has been elucidated in historical research, is an essential element in an accurate assessment of the role of the Empire in the law of nations.

In the first half of the eleventh century the position of the Holy See was consolidated as a result of the assertive Church reform movement, emanating from Cluny.[19] Although Emperor Henry III had been able to depose three rival Popes at the synod of Sutri (1046) and to install a new one of his choice, that new Pope's successor was able to initiate a completely new approach. Leo IX (who came from Alsace) succeeded in binding the high German clergy closely to Rome. Nicholas II, through his decree of 1059 concerning papal elections, deprived the German King of almost every possibility of participating in the election of the Pope.[20]

The investiture contest which flared up during the election of Pope Gregory VII in 1073 was a turning point which divided the earlier imperial

15 Heimpel, »Reich und Staat im deutschen Mittelalter«, in *Deutsches Mittelalter*, 1941, p.55; W. Holtzmann, *Das mittelalterliche Imperium und die werdenden Nationen*, 1953, pp. 8 & 10.

16 For literature on this point, see: W. Schüssler, *Vom Reich und der Reichsidee in der deutschen Geschichte*, 1942, p. 11; H. von Srbik, »Die Reichsidee und das Werden der deutschen Einheit«, 164 Historische Zeitschrift 459; F. Rörig, »Mittelalterliches Kaisertum und die Wende der europäischen Ordnung 1197«, in *Das Reich und Europa*, 1941, p. 41 ff.; A. Brackmann, *Gesammelte Aufsätze*, 1940, p. 1 ff.; W. Holtzmann, *Das mittelalterliche Imperium und die werdenden Nationen*, 1953, p. 11 ff.

17 »Sorge für den Glauben, für die Reinheit der Kirche an Haupt und Gliedern, Sorge für den gottgewollten Zustand der Welt« – Heimpel, »Reich und Staat im deutschen Mittelalter«, in *Deutsches Mittelalter*, 1941, p. 24 ff.

18 Heimpel, »Alexander von Roes und das deutsche Selbstbewusstsein des dreizehnten Jahrhunderts«, in *Deutsches Mittelalter*, 1941, p. 74, 84.

19 Brackmann, »Die politische Bedeutung der cluniazensischen Bewegung«, (1929) 139 Historische Zeitschrift 34.

20 Michel, *Papstwahl und Königsrecht*, 1936.

period from that which followed.[21] Now, for the first time, the Holy See, speaking through Gregory VII in the famous *Dictatus Papae*, formulated claims which shook the foundations of the traditional conception of unity with its co-ordinated ordering of the two supreme powers on the basis of equality.[22] The supremacy of the Papacy, its right to depose the Emperor and to absolve the princes from their feudal oath was announced with unprecedented clarity: »The name of the Pope stands as the only name in the world. He may depose emperors, he may absolve subjects from their fealty to wicked men«.[23] Henry IV's proclamation of the deposition of Gregory (1076) was ineffective, despite the concurrence of a number of the German princes and bishops. The papal ban, which was for the first time directed against a King, proved itself to be more effective.

Gregory's death brought an end to this first struggle over the *libertas ecclesiae*, which in fact did not seek to establish the freedom of the Church, but its superiority.[24] The Diet of Worms in 1122 settled the investiture contest through a carefully balanced compromise. The basic principle of medieval order, the co-ordinated position of *Imperium* and *Sacerdotium*, was preserved. The extension and consolidation of canon law, which reached its peak with the *Decretum Gratiani* in 1150, was contained within the framework of this order.

The principle of unity was threatened by political developments during the reign of the Staufen Emperors. The renovation of the imperial idea by Frederick I (Barbarossa, 1152-90) and his intellectual supporters was no less a revolutionary process than that engaged in by Gregory VII with his *Dictatus Papae*. Barbarossa and his entourage, including Rainald von Dassel and the chronicler Otto von Freising, were responsible for a fundamental change in the imperial idea. This change lay in the conception of the German Empire as the continuation of the ancient Roman Empire and therefore that the rules of Roman law on the authority and power of the princes could be applied to the German Emperor.[25]

There were two aspects of this »Romanisation« of the imperial idea during the Staufen dynasty.[26] First, it represented the secularisation of the imperial idea. The Empire's armed power was no longer regarded as the sword of the Roman Church: »The trend was for the Empire to move away from being a mere function of the Roman Church towards being a self-sufficient body and, at the same time and in line with the meaning of the imperial idea in

21 W. Holtzmann, *Das mittelalterliche Imperium und die werdenden Nationen*, 1953, p. 15.

22 K. Hofmann, *Der Dictatus papae*, 1933.

23 »Quod illi liceat imperatores deponere, quod a fidelitate subiectos potest absolvere«.

24 G. Tellenbach, *Libertas Ecclesiae. Kirche und Weltordnung im Zeitalter des Investiturstreites*, 1936.

25 Eberhard Otto, *Friedrich Barbarossa* (no date), p. 20.

26 The description provided here has been followed by Heimpel, »Reich und Staat im deutschen Mittelalter«, in *Deutsches Mittelalter*, 1941, p. 67 ff.

Late Antiquity, towards being a secular *dominium mundi* of civilisation«.[27] Although the term *sacrum imperium*, which the imperial camp compared to *sancta ecclesia*, concealed this trend, it nevertheless served its purpose in underlining the sacred character of the Emperor's office and liberating it from the requirement of ecclesiastical recognition and legitimation.

The second aspect of the »Romanisation« of the imperial idea was »the transition of Rome from object to subject, the fact that the King could no longer become Emperor as well but rather that the Empire also included the Kingdom«.[28] It was only as a result of this derivation of the German Kingdom from the Roman Empire that it became customary from the thirteenth century to regard the dominion of the German King in Italy as applying to the Emperor. In so far as the Popes claimed the right to bestow this dominion, the extension of the imperial idea in the Staufen period was a fateful development. The jurists of the Bologna school, who were trained in Roman law, participated to a considerable extent in this transformation of the imperial idea.[29] This development, which was initiated under Barbarossa and led to a »consequent romanisation«, continued under Henry VI and Frederick II.

In opposing the new power of the Staufen Emperors, the Papacy, now stronger than ever before, evolved into a new political world power. A series of great, politically significant Popes – Alexander III, Innocent III, Gregory IX and Innocent IV – represented stages in this development. At the Diet of Besançon in 1157 supremacy claims by the Emperor and the Pope clashed vigorously, having been brought into direct conflict as a result of a diplomatic manoeuvre on the part of the imperial chancellor, Rainald von Dassel. After the catastrophe of the Rome expedition of 1167, Barbarossa adopted a new policy and sought to cement the actual power of the Empire without insisting on controversial legal principles and titles. The result was the Peace of Venice of 1177, concluded with Alexander III. Although the Peace of Venice produced a temporary reconciliation of differences, it also revea-

27 »Das Kaisertum bekam die Neigung von der blossen römischen Kirchenfunktion weg zum Imperium Romanum, als autarkem Körper, d.h. zugleich zum spätantiken Inhalt des Imperiums, zur weltlich zivilisatorischen Weltherrschaft«.

28 »... dass Rom aus dem Objekt zum Subjekt wird; dass nicht mehr der König auch Kaiser werden kann, sondern dass endlich das Kaisertum das Königtum in sich begreift«.

29 See especially: R. Holtzmann, »Der Weltherrschaftsgedanke des deutschen Kaisertums«, (1939) 159 Historische Zeitschrift 251; A. Brackmann, *Der römische Erneuerungsgedanke und seine Bedeutung für die Reichspolitik der deutschen Kaiserzeit*, 1932 (Sitzungsbereich der Preussischen Akademie der Wissenschaften); *idem.*, »Die Wandlungen der Staatsanschauungen im Zeitalter Kaiser Friedrichs I«., (1932) 145 Historische Zeitschrift; R. Scholz, »Germanischer und römischer Kaisergedanke im Mittelalter«, (1940) 3 Zeitschrift für deutsche Geisteswissenschaft; W. Holtzmann, *Das mittelalterliche Imperium und die werdenden Nationen*, 1953, p. 81 ff.

led how far the mutual alienation of the two heads of Christendom had progressed.[30]

Innocent III (1198-1216) succeeded in gaining a hitherto unachieved degree of political power for the Papacy. He was the supreme feudal lord of Sicily, England, Scandinavia, Aragon, Portugal, Hungary, and Armenia. He further attempted to prove, by scholastic argumentation in his *Deliberatio papae* of 1200, that it was incumbent upon the Pope to investigate the suitability of candidates for the Emperor's crown. Just as God had set up two great lights in the firmament of heaven, a greater one to rule the day and a lesser one to rule the night, so he appointed two supreme dignitaries to the firmament of the universal church. This new view of the Pope-Emperor dyarchy found expression in a famous analogy: just as the moon derives her light from the sun, but is in truth inferior to the sun in both size and strength, so royal power derives its dignity from papal authority.[31] Pope Gregory IX, claiming to be the *dominus mundi*, lord of all things as well as of all men, issued his ban of excommunication against Emperor Frederick II in 1227. His successor, Pope Innocent IV, declared Frederick II's deposition at the Council of Lyons in 1245.

During the period in which these »political« Popes held office, a fundamental upheaval took place in the ecclesiastical conception of law. The principle that the competence of the Pope was restricted to spiritual matters and that he was simply the *orbis dominus ad ordinem spiritualem* had been constitutive of the conception of the dyarchic rule of the two offices during the High Middle Ages. It was now gradually abandoned, first through occasional deviations by Alexander III and Innocent III, and then through the codification and systematisation of canon law under the aegis of Gregory IX and Innocent IV. They extended the Church's political claim of supremacy into the foundations of canon law, which had persisted for centuries.[32]

In 1234, on behalf of Gregory IX, Raymond of Pennaforte drew up the large, official compilation of papal decrees which was destined to conflict with the imperial legislation of Frederick II. It formed the foundation for the development of a new type of clerical jurists – the »canonists« – and a new, essentially hermeneutic, discipline of canon law. As has been shown by R.W. and A.I. Carlyle in their monumental work on medieval political theory, the success of the papal claim to exercise a direct supreme power to decide spiritual as well as temporal affairs must be attributed primarily to the Roman-law-trained canonists of the second half of the thirteenth century.[33] Pope

30 P. Rassow, *Honor Imperii. Die neue Politik Friedrich Barbarossas 1152-1159*, 1940; Eberhard Otto, *Friedrich Barbarossa* (no date), p. 81 ff.

31 Grewe, *Fontes*, Vol. 2, p. 291; Ganshof, »Das Hochmittelalter«, in *Propyläen Weltgeschichte*, Vol. 5, p. 456.

32 Grewe, *Fontes*, Vol. 2, p. 585.

33 A.I. and R.W. Carlyle, *A History of Mediaeval Political Theory in the West*, 1928, Vol. 5, Chapters 5-7.

Innocent IV, who thought and argued in an entirely legal manner, was at the head of this new school of clerical jurisprudence. As Dempf explained, Innocent IV, in his *Apparatus ad quinque libros decretalium*, extended the occasional statements of Innocent III on papal supremacy into a systematic conception of law, and ultimately into a conception of the Roman law of sovereignty as a leader of the world as a whole, extending beyond the limits of Christendom. He was responsible for codifying the law-creating power – *potestas condendi canones* – of the Pope, his position as supreme judge – *iudex ordinarius* – over heathens and Jews as well as over Christians, his right to depose Emperors and all other princes, and finally, the conception of the sovereign rule of one single person – *regimen unius personae* – instead of two ministeria.[34]

It seems that there exists a particular dialectic necessity behind the tendency of declining powers and decaying institutions to exaggerate their ideological claims for superior dominion which equates with the degree to which their actual downfall had occurred. The Late Middle Ages provided a striking example of this experience. The intensity of claims for universal dominion on the part of the Empire and Papacy increased in proportion to the degree to which they had declined in power.

By about the middle of the thirteenth century the power of the imperial office was broken. It reached its nadir during the *Interregnum* of 1250-1273, from which it was never to recover its former imperial glory. However, by the beginning of the fourteenth century the power of the Papacy also began to decline. Although there was a temporary rise in papal power during the fifteenth century, after the »Babylonic exile of the Church« in Avignon (1303-77) and the schism (1378-1415), as Ranke explained, »the former situation was nonetheless never re-established«.[35]

During this period postulates were formulated, by the »Legists« on the Emperor's side and the »Curialists« on the Pope's side, which nevertheless went far beyond the Roman universalism of the Staufens and the aspirations to temporal power of their ecclesiastical antagonists. The intellectual climax of this development was marked on the Emperor's side by Dante, the poet of Ghibelline imperial ideology, and the two learned heads of the

34 »Die gelegentlichen Äusserungen Innozenz III. über die päpstliche Oberherrschaft zu einem Rechtssystem und zu einer römischen gedachten Souveränität eines Hauptes der ganzen Welt, nicht mehr nur der Christenheit, ausgebaut. Von ihm stammt die kanonistische Festlegung der rechtschöpferischen Gewalt des Papstes, der *potestas condendi canones* als *iudex ordinarius* auch über die Heiden und Juden, das Absetzungsrecht der Kaiser und aller anderen Personen und das souveräne *regimen unius personae* statt der zwei ministeria«. – Dempf, *Sacrum Imperium*, 1929, p. 442 ff. See also: Grewe, *Fontes*, Vol. 2, pp. 293 & 509.

35 »Doch hatten trotz alledem die alten Verhältnisse bei weitem nicht mehr statt« – Leopold von Ranke, *Die römischen Päpste in den letzten vier Jahrhunderten*, Vol. 1, 1938, p. 25.

post-glossator Bologna schools, Bartolus de Saxoferrato (1314-57) and Baldus de Ubaldis (1327-1400).[36] However, the works of these two illustrious Italian teachers of Roman Law contained within themselves the seed of the dissolution of late medieval universalism. It was almost certainly from Roman Law that Bartolus had derived the rule that the Emperor was the *de iure* lord of the whole world, that is, *dominus totius mundi* and *rex universalis*. However, he also took into account the fact that a multitude of completely independent kingdoms and other temporal authorities – *principes superiores non recognoscentes* – existed *de facto* at this time. Relying on the specific distinction between *de iure* and *de facto* institutions, he laid the foundation for the legal theory, which was soon to arise, of the sovereign territorial State of early modern times. The necessary intellectual bridge was provided by Baldus' dictum: *Rex in regno suo est Imperator regni sui.* This allowed for the possibility of transferring all the Roman Law rules originally meant to apply to the Emperor to the sovereign territorial princes. Bartolus did not use the dictum in this sense, but formulated it with regard to the Italian city States, through the principle *civitas sibi princeps.*[37]

In respect of the Papacy, this development reached its peak under Pope Boniface VIII and the ambitious postulates of his bull *Unam sanctum* (1302), which stated that it was necessary for the salvation of all human creatures that they be subject to him.[38] Dempf has convincingly demonstrated that Boniface VIII and the seemingly extreme medieval curialists did not actually think in medieval categories anymore. Boniface VIII was essentially a man of the Renaissance and his thought, like that of his curialist contemporaries, was governed by the »three main elements of the Modern Age: science, legal education and financial thought«.[39] His policy was »the last serious attempt to establish a theocratic system«, but it failed as a result of his struggle with King Philip the Fair of France.[40]

Those who stand out amongst the intellectual partisans of Boniface VIII as protagonists of ecclesiastical universalism and the papal *potestas directa in temporalibus*, include Aegidius Colonna (Aegidius Romanus, Gille de

36 F.C. von Savigny, *Geschichte des römischen Rechts im Mittelalter*, 6 Vols., 1850, pp. 137-184, 208-248.

37 Grewe, *Fontes*, Vol. 2, pp. 343 ff., 444; Cecil N.S. Woolf, *Bartolus of Sassoferrato*, 1913, p. 155; N. Figgis, »Bartolus and European Political Thought«, (1905) 19 Transactions of the Royal Historical Society.

38 »Porro subesse Romano pontifici omni creature declaramus, dicimus definimus omnio esse de necessitate salutis«.

39 »Den drei Hauptfaktoren der Neuzeit, Wissenschaft, juristischer Bildung und geldwirtschaftlichem Denken« – Dempf, *Sacrum Imperium*, 1929, p. 442.

40 »Der letzte ernsthafte Versuch zur Aufrichtung eines theokratischen Systems« – F.L. Ganshof, »Das Hochmittelalter«, in *Propyläen Weltgeschichte*, Vol. 5, p. 394, 448.

Rome),[41] James of Viterbo (Jacobus Capocci),[42] Alvarus Pelagius[43] and Augustinus Triumphus of Ancona.[44] The essence of their speculations on political theory was expressed by Alvarus Pelagius in statements to the effect that the Pope was the universal monarch of Christendom and lawfully of the whole world, and that he had, with the sole exception of the power of creation, all the powers held by God himself.[45]

As a result of recent historical research there is no doubt that the political theory of the Middle Ages ignored political reality by embracing the conceptions of a surviving Roman Empire and Emperor and maintaining the idea of a Christian universalism: »Until well into the Modern Age the real picture of the medieval political world has thus been disguised.... Today no doubt remains, that an Empire, as it existed in the dreams of Dante and Marsilius of Padua, and as was held to be historical truth by Giesebrecht and Julius Ficker, ever existed in the Middle Ages – regardless of whether one considers the Pope or the Emperor to be its visible head«.[46]

IV. Political and Territorial Subdivision

The political subdivision of Christendom under the dyarchy of Pope and Emperor became more defined during the transition to the High Middle Ages, and is in its basic outlines preserved in the modern State system.

After the disintegration of the Carolingian Empire, which extended from the Partition of Verdun into three realms in 843, through the division of the Lotharingian Central Realm by the Treaty of Meersen in 870, to the definitive mutual recognition of the Eastern and Western Realms by the Treaty of Bonn of 921, it was Germany and France which emerged as the political nuclei of the Occident. Between them was an »expanse of political devastation«,[47] the remnants of the Lotharingian *regnum*, Lorraine, Burgundy and Northern Italy.

41 *De ecclesiastica sive de summi pontificis potestate* (1302), ed. G. Boffito and G. Oxilia, *Un trattato inedito di Egidio Colonna*, 1908.

42 *De regimine christiano*, 1302 (ed. H. Arquillière, *Le plus ancien traité de l'église*, 1926).

43 *De planctu ecclesiae*, 1332 (Lyon, 1517).

44 *Summa de potestate papae*, 1320 (Venice, 1487).

45 »Papa universalis monarcha totius populi Christiani et de iure totius mundi« – I a 13. »Excepta creandi potestate potest papa quasi omnia facere quae potest Deus« – IV, 70.

46 »Bis tief in die Neuzeit hinein ist dadurch das wahre Bild der Staatenwelt des Mittelalters verdeckt worden ... Es unterliegt heute keinem Zweifel mehr, dass es ein solches Imperium, wie es Dante und Marsilius von Padua geträumt, Giesebrecht und Julius Ficker für geschichtliche Wirklichkeit gehalten haben, im Mittelalter nie gegeben hat – ganz gleich ob man den Papst oder den Kaiser als sichtbares Oberhaupt angesehen haben mag«. – Dickmann, *Friedensrecht und Friedenssicherung*, 1971, p. 99.

47 »Politisches Trümmerfeld« – Mitteis, *Der Staat des hohen Mittelalters*, 1940, p. 96.

The German area took political shape in the form of the German Kingdom, as linked together and elevated by the Roman Imperial office through Otto the Great. The French Kingdom was, after the death of the last Carolingian in 987, consolidated into the Capetian dynasty. Although the large feudal principalities of Francia, Champagne, Burgundy, Aquitaine, Brittany, Normandy and Flanders developed first, during the tenth century, a tightening of the loose feudal structure occurred soon afterwards. This process was of benefit to the royal power, once the large feudal lords had been deprived of their power. It has been accurately described as a process of »concentric concentration«.[48]

England, under Edward the Elder and his successor Aethelstan, was, during the tenth century, temporarily subject to one ruler only. After the transitory formation of a Danish-Norwegian-English Kingdom by Canute the Great (1016-42), the political shape of England was formed by the Norman conquerors of 1066. In Denmark, Norway and Sweden closed realms had already appeared, at the end of the tenth and the beginning of the eleventh centuries. In the East, an independent Poland emerged in the tenth century and attempted in vain, under its second duke, Boleslaw Chrobry, to establish a greater Slavonic realm. It was only with long interruptions, caused by domestic dissent, that the Poles succeeded in asserting themselves as an independent entity in the Middle Ages. Like the Duchy and later the Kingdom of Bohemia, Poland was for a long time linked in a vassal relationship with the German kings.

In Russia, the Varangians (Russified Vikings) founded a realm in 862, the centre of which gradually moved from Novgorod to Kiev. The conversion of Grand Duke Vladimir of Kiev to Byzantine Christianity in 988 required a cultural distancing from Roman Christianity. However, an actual estrangement from the occidental cultural orbit did not occur until the Mongolian invasions in the first half of the thirteenth century.

The Hungarians began to establish themselves as a political entity towards the end of the tenth century. They could be considered part of the Occident from the time of Stephen I (the Saint, 987-1038), who adhered to Roman Christianity and had received his crown from the Pope.

The political fate of Italy was both changeable and fragmented. In the north, an »Imperial Italy« emerged in the territory of the Lombard Kingdom from the time of Otto the Great. In view of the political position of the papacy, the *Patrimonium Petri* (the Papal State of Middle Italy, formed in the eighth century), was of particular importance. In southern Italy, a Norman Kingdom emerged after the Norman Duke Robert Guiscard successively gained control of Apulia, Calabria and Sicily from 1059. This kingdom continued into the *Regnum Siciliae* of the Staufen Dynasty and the Kingdom of the Two Sicilies in early modern times.

On the Iberian peninsula, the union of Castille and Leon in 1073 finally produced a political nucleus strong enough to expel the Moors from Europe and lay the foundations of Spanish power.

48 »Konzentrische Konzentration« – *ibid.*, p. 147.

It is impossible to examine all of the changes and ramifications of the political subdivision of the Occident here.[49] For the purposes of this book it is sufficient to focus on the most important political centres of power within occidental Christian communities. Most of these centres of power appeared at the beginning of the High Middle Ages and continued, at least in essence, into the modern State system. An unofficial document, emanating from the entourage of the Papal Chancery in 1504, listed the Christian rulers in order of precedence: after the Emperor and the Roman-German King came the Kings of France, Spain, Aragon, Portugal, England, Sicily, Scotland, Hungary, Navarre, Cyprus, Bohemia, Poland and Denmark, followed by a large number of dukes.[50] This list indicated the existence of a »plurality of politically independent structures«.

According to one study of greater importance and decisiveness than previous assessments of the different models of historical description, the political overestimation of the medieval »universal powers«, not only of the Empire but also of the Papacy, »is founded upon an insufficient knowledge of the sovereign authority and the fully independent development of numerous kingdoms across the entire Occident«.[51]

49 See: Ganshof, »Das Hochmittelalter«, in *Propyläen Weltgeschichte*, Vol. 5, p. 456.
50 Grewe, *Fontes*, Vol. 2, p. 265; G. Butler & S. Maccoby, *The Development of International Law* (London, 1928), p. 11.
51 »Letzten Endes zurück auf eine ungenügende Kenntnis der kraftvollen Eigenstaatlichkeit und völlig selbstständigen Entwicklung zahlreicher Königreiche im ganzen Abendland«. – K.F. Werner, »Das hochmittelalterliche Imperium im politischen Bewusstsein Frankreichs (10.-12. Jhdt.)«, (1965) 200 Historische Zeitschrift 58.

Chapter Two

The Foundation of the International Legal Community: The Occidental Christian Community

Although a concept of humanity had developed in the Hellenism of Late Antiquity and formed the spiritual background of the Roman Empire,[1] it offered no more of a foundation for the concept of a law of nations than did the political reality of the Roman Empire for the development of a concrete international legal order. The collapse of the *Imperium* heralded the downfall of this idea, during the stormy period of mass migrations which followed.

Three consistent, separate fields of civilisation developed in the course of the Early Middle Ages: the Occident, which was formed by the Roman-Germanic nations; the Greco-Slavonic civilisation, which was centred around Byzantium; and the Arab world - or in other words, the spheres of the Roman Catholic Church, the Greek Orthodox Church, and Islam.[2]

The basis of the medieval law of nations was provided by the consciousness of the occidental nations that they belonged together and formed a community. This consciousness found its definitive shape during the centuries following the powerful political unification of the Occident into the Greater-Frankish Empire of Charlemagne. The memory of this first ruler of a unified Occident was, in itself, an integrating element within the growing consciousness of an occidental legal community.[3]

The bonds, which linked the individual members of this community with each other and at the same time separated them from the Greco-Byzantine and the Islamic worlds, were threefold. The international legal community was identical to the Christian community, united in the Roman Church.[4] This community of faith was the strongest cohesive bond. It coincided with the common Latin language and culture, as well as with the key institutions and the phenomena of social and political order which existed among the nations of the Occident. Apart from the common recognition, albeit to diffe-

1 M. Mühl, *Die antike Menschheitsidee*, 1928; R. Reitzenstein, *Wesen und Werden der Humanität im Altertum*, 1907; Kaerst, *Die antike Idee der Ökumene*, 1903.
2 O. Westphal, *Philosophie der Politik*, 1921, p. 138; Näf, *Die Epochen der neueren Geschichte. Staat und Staatengemeinschaft vom Ausgang des Mittelatlers bis zur Gegenwart* (2nd edn.), 1959, Vol. I, pp. 83, 216; *Propyläen Weltgeschichte*, Vol. 5.
3 R. Wallach, *Das abendländische Gemeinschaftsbewusstsein im Mittelalter*, 1928, p. 12.
4 Verosta, »Die Geschichte des Völkerrechts«, in Verdross, *Völkerrecht* (5th edn.), 1964, p. 51; Stadtmüller, *Geschichte des Völkerrechts*, 1951, p. 58 ff.; G. Tellenbach, »Vom Zusammenleben der abendländischen Völker im Mittelalter«, in *Festschrift G. Ritter*, 1950, p. 1, 42. The argument advanced by H. Krüger, »Die geistige Einheit der Völkerfamilie«, (1950) 21/7 Zeitwende 535, that there was never a Christian Family of Nations, remains unsupported and is unconvincing.

rent degrees, of the authority of Emperor and Pope, it was above all the supra-national consciousness of solidarity, strongly rooted as it was within the clergy, the chivalry and the municipal communities, which most strengthened the sense of community among the occidental nations.[5]

The conviction of Christian solidarity found its strongest manifestation in the fight against the infidels. The idea of the crusades, the holy wars against the infidels, led to a particular and characteristic legal institution of the medieval law of nations.[6] Saint Augustine had already prepared its intellectual foundation in adopting from Antiquity, and particularly from Cicero, the doctrine of *bellum iustum* - the »just war«. He extended this doctrine to include religious wars against heretics and heathens.[7] This concept became reality for the first time during the Council of Clermont in 1095, when Pope Urban II appealed for the first crusade, thus igniting a powerful flame of religious enthusiasm. Eight expeditions of this kind united the Christians of western Europe under the leadership of Emperor or Pope for the conquest of the Holy Land and the temporary establishment of a »Latin Empire« in Constantinople.

In an encyclical of 1061 A.D. addressed to the bishops of Spain, (which was mentioned in the *Decretum Gratiani)*, Pope Alexander II called for a war against the Saracens. He argued that in this struggle the Christians were always in a state of legitimate defence.[8] The famous canonist Hostiensis (Henry of Segusia)[9] presented a doctrine of the just war in his chapter *De treuga et pace* of his *Summa aurea*, in which he described »war« precisely as a Christian war against the infidels. In his understanding, the occidental Christian community was the legal successor of the Roman Empire, and he referred to the war as *bellum Romanum.*

However, such ideas should not be overestimated and generalised. They represent only one school of the medieval concept of law which emerged at the end of the eleventh century and was honed in subsequent centuries. There were often contrary opinions.[10] Thomas Aquinas, for example, made the counter-argument that it was not the purpose of holy war to convert infidels by force. They should only be coerced into not obstructing the expansion of the Christian faith.[11] Accordingly, there were different judgments as to the international legal status of the infidels. Only in isolated instances was the inference made that all people outside the Christian international legal

5 Tellenbach, *ibid.*, p. 42.
6 Erdmann, *Die Entstehung des Kreuzzugsgedankens*, 1935.
7 Dickmann, *Friedensrecht und Friedenssicherung*, 1971, p. 85 ff.
8 *Decretum Gratiana*, secunda pars, causa XXIII, quaest. VIII, ch. XI.
9 Henry of Segusia, Professor in Bologna and Paris, in 1262 appointed Cardinal Bishop of Ostia, died 1271. On his doctrine of war see: *infra* 113.
10 F.A. van der Heydte, *Die Geburtsstunde des souveränen Staates*, 1952, p. 232 ff.; Stadtmüller, *Geschichte des Völkerrechts*, 1951, p. 69.
11 »Fideles Christi frequenter contra infideles bellum movent, non quidem ut eos ad credendum cognant ... sed propter hoc ut eos compellant ne fidem Christi impediant ... Nullo modo sunt ad fidem compellandi quia credere voluntatis est«. - *Summa theologiae*, II, ii, qu. 10, art. 8.

community were beyond the pale of law, *hors la loi*. In this sense, Christine de Pisan argued that a safe-conduct engagement given to a Saracen did not bind anyone, because it was null and void.[12] On the other hand, Bernard of Clairveaux, the missionary who advocated and organised the crusade movement, considered the killing of heathens to be permissible only in self-defence. As a matter of fact the Christian idea of natural law had already denied the complete outlawry of the infidels.[13] According to its own postulates, the idea of natural law is not only »common to all peoples« (Isidore of Sevilla),[14] it is even »common to us and to other living creatures« (Thomas Aquinas).[15] Thus, medieval legal thought was rooted in the basic conviction, that behind the closer community of Christians there was a wider society of all mankind founded on the law of nature. This *communitas omnium gentium*[16] included the infidels and established certain ultimate and unshakable legal limitations on hostilities between Christians and infidels.

The canonists of the Late Middle Ages were the first to advocate, with logical consistency, the thesis that man is deprived of all rights when in a state of mortal sin: *Nullus est dominus civilis, quam est in peccato mortali*. The sixteenth century Spanish conquistadors adopted this doctrine,[17] the origins of which go back to Aegidius Romanus, a contemporary of Boniface VIII during the Late Middle Ages. These radical champions of Papal universalism contended that infidels could neither own property legally nor exercise legitimate public authority. All of the infidels' possessions and dominions were thus usurped and held without lawful title.[18]

On the other hand, these same canonists vehemently defended the view that the spiritual dominion of the Roman Pope encompassed all of mankind (*rector et caput totius orbis*), and that this power *plenissima potestas super omnem creaturam* included the heathen as »Christ's sheep« (*oves Christi*). Augustinus Triumphus, the author of these ideas, simply restricted the temporal power of the Pope to the realm of occidental Christendom.[19] However, as Aegidius Romanus in particular stressed, the *dominium universale et superius*, the overlordship of the *Summus Pontifex* should extend to all countries, whether Christian or heathen, as the vicar of Christ (*Dei vicarius*).[20]

12 Christine de Pisan (1364-1429), *Le livre des faits d'armes et de chevalerie*, 1489; J.T. Johnson, *Just War Tradition and the Restraint of War*, 1981, p. 142.
13 See: *infra* 144.
14 *Etymologiae*, 5, 4.
15 *Summa theologiae*, II, q. 57, a. 3.
16 F.A. van der Heydte, *Die Geburtsstunde des souveränen Staates*, 1952, p. 223; Stadtmüller, *Geschichte des Völkerrechts*, 1951, p. 65.
17 See: *infra* 146.
18 »Ostendentes quod nullam possessionem, nullum dominum, nullam potestatem possunt infideles habere verum et cum iustitia«. ... »Immo, apud infidelis non solum non sunt regna et imperia, cum apud eos regna et imperia sint magna latrocinia, immo etiam apud eos non sunt aligna iusta dominia«. - *De ecc.*, II, 11.
19 *Summa de potestate papae*, quaest, II, 1. XXIII, 1. See also: W. Fritzemeyer, »Christenheit und Europa«, (1931) 23 Historische Zeitschrift 1, 6.
20 B. Landry, *L'idée de chrétienté chez les scolastiques du XIIIe siècle*, 1929, p. 148 ff.

In political reality, emperors and popes, no less than princes and other authorities of occidental Christendom, maintained numerous relations with the infidels. They concluded treaties with them and in armed conflicts treated them as legitimate adversaries - *iusti hostes*. Before embarking on his crusade, Frederick Barbarossa dispatched Count Henry of Diez formally to declare the opening of hostilities to Sultan Saladin, in accordance with the rules of chivalry.[21] The Italian city States, in particular Genoa and Venice, maintained close trading relations with the Islamic orient throughout the Middle Ages. The idea of maintaining a minimum standard of international legal relations with the infidels on the basis of natural law, which was generally recognised as binding for all peoples, corresponded broadly to the practical needs of commercial intercourse in the Mediterranean world.[22]

The fundamental distinction between Christians and infidels and the exclusion of the latter from the more integrated occidental international legal community was, however, not undermined by this practice. Occidental Christendom, even if a strictly limited and closed society from the outside, preserved in its bosom the natural sub-division of nations. In the Christian philosophy of history, the idea that there was only a unified and undifferentiated Christendom rather than individual Christian nations was always reserved for the final age of the world.[23] The medieval Christian consciousness of unity was governed by the idea of a structured community; Christendom was conceived of as a *communitas communitatum*. Even the most radical and most comprehensive constructions of the Pope's universal spiritual and temporal power did not encroach, even in political terms, on the natural differentiation of nations in the Christian world. However much the superiority of papal power to control and apply sanctions was extended, an independent legal sphere of the various secular authorities was always recognised. Although the popes claimed the right to depose the holders of the highest secular offices, they never sought to abolish the edifice and order of these offices. Even curialists like Aegidius Romanus did not doubt the indispensability of the temporal sword.

In the terminology of medieval sources, many names were given to the occidental community of Christian nations.

From the ninth century, the idea of Christendom (*Christianitas*) developed in the sense of a specific Christian communitarian solidarity distinct from that of *ecclesia* or *Imperium*. This idea implied from early on a pluralistic concept of nations and empires, and was more or less synonymous with the terms *populus christianus* and *res publica christiana*.[24]

21 Otto, *Friedrich Barbarossa* (no date), p. 149.

22 L. de Mas Latrie, *Traités de paix et de commerce et documents divers concernant les rélations de chrétiens avec les arabes de l'Afrique septentrionale*, 1865; R.A.-M. de Maulde-la Clavière, *La diplomatie au temps de Machiavel*, 1892-93, p. 71 ff.; L. Salvatorelli, *Geschichte Italiens*, 1941, p. 367 ff.

23 A. Dempf, *Sacrum Imperium*, 1929, p. 89.

24 D. Hay, *Europe, The Emergence of an Idea* (Edinburgh, 1957), esp. Ch. 2, *Christendom*, p. 16 ff.; F. Kempf, »Das Problem der Christianitas im 12. und 13. Jahrhundert«, (1960) 79 Jahrbuch der Görresgesellschaft 104; H. Lutz, *Christianitas afflicta*, 1964, p. 15 ff.

The history of the term »Christendom«, which is in many ways enigmatic, reflects the entire spectrum of the disputes between *Imperium*, *Sacerdotium* and the increasingly self-reliant and self-conscious *Regna* of the Occident.

Unum regnum, una Christi columba, videlicet sancta ecclesia, unius christianitatis lex, regni unius et unius ecclesiae - such formulations were coined by Hinkmar of Reims, the eminent publicist and ecclesiastical politician, who as Archbishop of Reims in the second half of the ninth century sought recognition as Primate of the West Frankish Empire.[25] Otto of Freising, the chronicler of Emperor Barbarossa, welded Saint Augustine's idea of the *civitas Dei* to the imperial aspirations of the Staufen dynasty; he used this term for the higher unity of Christendom which embraced both *Imperium* and *Sacerdotium*.[26]

Otto of Freising's contemporary, the Englishman John of Salisbury, who opposed the Staufen imperial concept, raised the thorny question as to who had installed the Germans as judges over other nations, and spoke of a *una res publica*.[27] Thomas Aquinas spoke of a *res publica sub Deo*;[28] Alexander of Roes of a *res publica fidei christiane*.[29] In similar fashion William of Occam spoke of a *una civitas*,[30] James of Viterbo of a *unum regnum*,[31] and Alvarus Pelagius of a *civilitas et politia christiana*.[32] In the final phase of the Middle Ages, *res publica christiana* was a generally accepted term, even in the chanceries.[33] However, it already bore the signs of the dissolution of the sense of Christian solidarity, which is characteristic of the Late Middle Ages. It was oriented towards the image of a community of equal Christian rulers and nations, opposed to the concept of imperial universalism (*»corpus principum christianorum«*).[34]

25 A. Dempf, *Sacrum Imperium*, 1929, p. 164.
26 J. Spörl, *Grundformen hochmittelalterlicher Geschichtsanschauung*, 1935, pp. 43 & 88.
27 *Polycratius, sive de nugis curialium et vestigiis philosophorum libri octo*, Vol. 4, pp. 1-4, Vol. 5, pp. 2-6.
28 *Summa contra gentes*, Vol. 3, p. 129; *Summa theol.*, Vol. 2, p. 2, qu. 122, a. 1.
29 Heimpel, »Reich und Staat im deutschen Mittelalter«, in *Deutsches Mittelalter*, 1941, p. 85.
30 *Dialogus*, Vol. 3 (1338), tr. 21 (M. Goldast, *Monarchia sacri romani imperii*, Vol. 2 (Frankfurt, 1668).
31 *De regimine christiano*, Vol. 1, p. 1.
32 *De planctu ecclesiae*, Vol. 1, a. 13.
33 R.A.-M. de Maulde-la Clavière, *La diplomatie au temps de Machiavel*, 1892-93, Vol. 1, p. 16, fn. 1.
34 J. Engel, »Von der spätmittelalterlichen res publica christiana zum Mächte-Europa der Neuzeit«, in *Handbuch der europäischen Geschichte*, Vol. 3, 1971, pp. 33, 40, 43-7, 212, used the term *respublica christiana* in the sense of a specific late medieval concept. Quaritsch, *Staat und Souveränität*, 1970, Vol. 1, p. 51, fn. 30, criticised this linguistic usage. He doubted the adequacy of this term to define the Christian unity of the European Middle Ages which began with Charlemagne. In his opinion, the term only became customary in the Late Middle Ages. However, this is incorrect. The term can be found in Church prayers from the first half of the eighth century, such as the Gregorian Sacramentar, which Pope Hadrian dispatched in copy form to Charlemagne. See: P.E. Schramm, »Die Anerkennung Karls des Grossen als Kaiser«, (1951)

That this community of Christian nations was at the same time identical to the Latin cultural community, is most conspicuously demonstrated by the contrast which it represented *vis-à-vis* the Greco-Byzantine world. This contrast was understood to be religious as well as cultural in character.

The relationship between occidental Christendom and the Greco-Byzantine sphere of civilisation certainly differed in some nuanced respects from Christendom's relationship with the Islamic world. Papal policy involved repeated attempts to bring the Greek Church into the bosom of the Roman Church, into *una sancta ecclesia*. Yet in the thinking of the occidental nations a profound separation from oriental Christians predominated. Princes and peoples were more inclined than popes to consider the Greeks as closer in their faith to the Mohammedans, who were perceived as infidel enemies of Christianity, and as heretics. Together with Armenians, Syrians and Jacobites, Mohammedans were seen as on the same level as Turks and heathens.[35] When Constantinople was conquered during the fourth crusade and the Greek Empire was transformed into a Latin Empire, the new Emperor announced to the Pope that the conquest was a Latin triumph. This, in view of the deep-rooted hostility of the Greeks and their resistance towards the Pope, was considered more valuable than a conquest of Jerusalem.[36] In fact the crusaders suffered no less hostility from the Greeks than from the Saracens, while they themselves in their principalities degraded the oriental Christians and deprived them of their rights.

That this enmity did not rest exclusively on the separation of the Churches, but at the same time on the existence of a contrary sense of civilisation, can be demonstrated by the numerous arguments which both sides used to prove their cultural superiority. The occidental nations, the »Franks«, were considered by the Greeks to be a coherent cultural community the cultural arrogance of which was regarded with irony. In response, the occidentals, who called themselves »Latins« to distinguish themselves from the Greeks, boasted vehemently of the achievements of their sciences, scholastic philosophy, the perfection of their language and customs, the successes of their commerce, and even of their medical advances.

The result of this rift in religion and civilisation was the continued exclusion of the Greco-Byzantine world from the closer legal community of occidental Christendom. Like the Islamic family of nations, it formed a separa-

172 Historische Zeitschrift 465. However, it is not disputed that the term was used most frequently in the Late Middle Ages, far into the sixteenth century, for example by Erasmus. In this period, it was conceived in the sense which Quaritsch had in mind, that is, as the essential concept of a community of equal ranking Christian rulers and nations and in contrast to the concept of a universal monarchy of the German Emperors. In this respect, it seems preferable to avoid using the term in relation to the entire Middle Ages - as was done by Grewe, »Res Publica Christiana, Vom Wesen der mittelalterlichen Völkerrechtsordnung«, (1940) 16 Europäische Revue 594, as well as Kempf, Reibstein, Scheuner and Carl Schmitt.

35 R. Wallach, *Das abendländische Gemeinschaftsbewusstsein im Mittelalter*, 1928, p. 25.

36 *Ibid.*, p. 27.

te legal sphere, the internal relations of which were regulated by a law of nations largely influenced by Byzantium.[37]

Although the Byzantine Emperor claimed autocratic spiritual superiority over the other rulers of this Greco-Slav region as *Basileus* and *autocrat*, in secular political matters there existed between them a far-reaching actual equality and independence.[38] Thus the relations of the orthodox princes of Serbia and Bulgaria, of Moldova and Wallachia, of Kiev, the north-Russian territories and Georgia with occidental Christendom were similar to the manifold relations of the latter with the Arab Caliphate and its Islamic successor States.[39]

Together with Christianity and Latinism, it was the occidental culture of courts and chivalry which was, for the law of nations, the most significant central element of the medieval spirit of communitarianism. The heyday of this development occurred during the Staufen age, and was epitomised in Germany by the names of Walther von der Vogelweide, Hartmann von Aue and Wolfram von Eschenbach (all three of whom were born around 1170).[40] However, long after chivalry had lost its political and military importance as well as its economic foundation, the power of the ideal of chivalrous life remained unshaken.[41] For centuries the fascination with this noble way of life remained so strong that even city-dwelling citizens submitted to it to the extent that they were able.[42]

This style of chivalry reached its apogee in Germany and France, but it was a common phenomenon throughout the Occident. Chivalry »placed a fraternal bond around all those who belonged within its fold, irrespective of their nationality or rank of nobility«.[43] This class solidarity of occidental chivalry, which transgressed ethnic and territorial borders, reappeared in the

37 Verosta, »Die Geschichte des Völkerrechts«, in Verdross, *Völkerrecht* (5th edn.), 1964, p. 59; Stadtmüller, *Geschichte des Völkerrechts*, 1951, p. 52; Truyol y Serra, *Die Entstehung der Weltstaatengesellschaft unserer Zeit*, 1963, p. 28 ff.

38 G. Stadtmüller, *Geschichte des Völkerrechts*, 1951, p. 54 ff., emphasised the prevalence of the idea of a State hierarchy in the orthodox Byzantine concept of an international legal community in Eastern Europe. Verosta, »Die Geschichte des Völkerrechts«, in Verdross, *Völkerrecht* (5th edn.), 1964, p. 58, on the other hand, stressed that the subordination under Byzantium had soon become simply ecclesiastical, and that even this relationship had been superseded by the *Autokephalie* of the various national churches. In fact, in Eastern Europe as in the Catholic Occident, the hierarchical claims of the Emperor and the *de facto* political independence of the temporal authorities were closely interwoven and cannot be constrained with precise legal definitions.

39 Verosta, *ibid.*, p. 58 ff.

40 H. Naumann, »Deutsche Kultur im Zeitalter des Rittertums«, in *Handbuch der Kulturgeschichte*, Part 1, 1938, p. 5.

41 J. Bühler, *Die Kultur des Mittelalters*, 1931, p. 180.

42 J. Huizinga, *Herbst des Mittelalters* (5th edn., 1939) p. 130.

43 »Schlang um alle, die seinen Reihen angehörten, welchem Lande und welchem Adelsrang sie auch angehören mochten, ein brüderliches Band«. - Salvatorelli, *Geschichte Italiens*, 1941, p. 165.

solidarity of the European dynasties of later centuries. In this form it continued to be a stabilising element in thought about the international legal community until the beginning of the nineteenth century.

The range of virtues linked with the ethical concept of chivalry, the ideals of moderation, honour, fidelity, discipline, steadfastness, gallantry, courage, clemency and charity entered into the fundamental ethical substance of the medieval sense of justice. Specific medieval institutions, such as feudalism and private warfare, were inseparably linked to the way of life and creed of chivalry. As these institutions penetrated the order of the law of nations,[44] the idea of chivalry became effective in this sphere as well. As a result of the close and almost inseparable relationship of private and public warfare,[45] the entire laws of war were also governed by this idea, even though the ecclesiastical-scholastic theory of war did not clearly reflect this.

There were many connections within the community of the *res publica christiana*. In addition to the chivalry, the ministry, from the clergy to the orders of priesthood, formed a tightly knit cohesive supranational element. The same is true, albeit to a lesser degree, of the medieval urban world of dependent and independent cities. From the end of the twelfth century, hanseatic leagues among the large trading cities formed one of these many connections, which were woven into the fabric of the international legal community. At their height, these urban leagues were independent subjects of international law with the power to conclude treaties. They conducted wars using their own armies and fleets and concluded alliances and peace-treaties with foreign sovereigns. The Flemish Hanseatic League at Bruges (1252), the Rheinish and the Swabian Leagues (1252 and 1276 respectively) may be mentioned as examples. An outstanding example was the German Hanseatic League (1358), whose »Men-of-War« defeated not only the widely-feared Baltic pirates, the *Vitalienbrüder* (Vigorous Fraternity), but also succeeded in their war against Waldemar Atterdag, the King of Denmark, whom they forced into the Peace Treaty of Stralsund in 1370.[46] The Hanseatic regulations (*Hanserezesse*) established by the Hanseatic assemblies, codified comprehensive rules of trade and navigation, which also influenced the maritime law of nations.

The establishment of organised consular relations, which formed an essential linkage between nations and now constitute an important institution of modern international law, may be accredited to the large medieval trading towns and ports. This institution evolved out of various related practices. At the beginning of the thirteenth century representatives and agents

44 See: *infra* 105.

45 See: *infra* 105 ff.

46 D. Schäfer, *Die Hansestädte und König Waldemar von Dänemark. Hansische Geschichte bis 1376*, 1879; Sartorius von Waltershausen, *Urkundliche Geschichte des Ursprungs der deutschen Hanse*, Vols. 1-2, 1830; F. Rörig, *Mittelalterliche Weltwirtschaft*, 1933 (Kieler Vorträge No. 40). On the international legal significance of the German Hanseatic Leagues, see: E. Reibstein, »Das Völkerrecht der deutschen Hanse«, (1956/57) 17 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 38; Stadtmüller, *Geschichte des Völkerrechts*, 1951, p. 72 ff.

of the merchant trade corporations (the *ordines maris*) appeared in the large Mediterranean ports. The function of these consuls (*consules maris*) was to protect trade and foreign merchants. They were selected for their knowledge of commercial and maritime law and were experienced in judicial functions. Such persons could be found in Pisa, Genoa, Ancona, Messina, Montpellier, Perpignan, Valencia, Barcelona and on the island of Mallorca. Shortly thereafter, overseas consuls (*consuls d'outre mer*) were appointed in order to organise the relations of European merchants with North Africa and the Middle East. In a treaty of 1230 made with a Saracen prince, the King of Sicily authorised the privilege of a Muslim consul in Corsica to protect his compatriots and fellow-believers and to administer justice over them in the name of the Christian king. Finally, there were commercial consuls (*consules mercatorum* or *consules negotiatorum*) whose existence may be traced back as far as the middle of the twelfth century. Their activities extended as far as the inland towns of northwestern Europe. From 1257, some twenty consuls of this kind administered the legal protection of their compatriots trading in the city of Bruges.[47]

Thus, the elements on which the solidarity of the medieval Christian family of nations rested were manifold and differentiated. Despite some sceptical opinions in respect of the strength of this solidarity,[48] (to the effect that it did not prevent Christian States from concluding alliances with the infidels against other Christian powers), there can be no doubt that it was sufficiently strong to provide the medieval law of nations with a stable and workable foundation.

47 C. van Vollenhoven, *Du droit de paix. De Iure Pacis*, 1932, p. 2 ff.
48 See e. g.: H. Holborn, *Der Zusammenbruch des europäischen Staatensystems*, 1954, p. 18.