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# *The Idea of European International Law*

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## **Abstract**

*The nature of international law as a legal system which, on the one hand, responds to the need for interaction between states inherent to international society and, on the other hand, is based on agreement between states, categorically excludes viewing international law as the product of a specific regional, i.e., European, tradition. Yet it is still asserted that international law is a European tradition. Such assertions are not only conceptually flawed, but are also unsupported by evidence. The origins of international law lie outside Europe, and at no stage of its development has international law been a truly European system. This holds true not only in terms of general international law, but also in relation to certain ideas developed at the European level, including the 'public law of Europe', and of modern European projects that appear to be based on ideas of a regional solidarity in Europe.*

## **1 Introduction**

The idea that international law is both an integral part of and product of the European tradition has often been proposed, but has rarely been critically examined. Professor Koskenniemi's reliance on this notion<sup>1</sup> has brought to the fore the conceptual and historical features of international law. It would seem, however, that no systematic analysis has yet been undertaken of the factors that may have made international law a legal system of European origin. It would also seem that the time is right for that analysis to be undertaken.

This article will examine how and when the idea of the European character of international law emerged and will explore the ends and sentiments by which it was driven. The article will then analyse state practice in the relevant periods of history to evaluate whether the assumption that international law was a product of the European tradition is justified. Finally, modern European projects will be examined in the light of this idea of European international law.

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<sup>1</sup> Koskenniemi, 'International Law in Europe: Between Tradition and Renewal', 16 *EJIL* (2005) 113.

Although this contribution takes up some of the points raised by Koskenniemi in his paper, it is intended as more than a reply to him; this article constitutes a positive attempt to examine the questions raised by Koskenniemi and others in a consistent and systematic manner, clarifying issues of empirical evidence and state practice as well as analysing academic debates which focus on the emergence and scope of 'European international law'.

## 2 The Origins, Essence and Development of the Idea of European International Law

The idea of European international law as a legal system or a sub-system of international law implies a certain degree of exclusivity, manifested in legal rules and principles applicable within a close-knit legal community and different from the rules and principles applicable outside that community. Such exclusivity and differentiation, ultimately translated into legal inequality, mean that states within that close-knit legal community are bound by legal norms and principles in relation to each other but not in relation to other states, or that the norms governing the relations with other states are different from those applicable to states within that close-knit legal community. This, in its turn, impacts on the scope of the freedom of action of the states belonging to the exclusive legal circuit.

This conception of exclusivity has by no means dominated international law doctrine over the centuries. The universality of international law based on natural law applicable to all nations was accepted in European thinking as long ago as the 7th century.<sup>2</sup> As has been documented, most mediaeval thinkers did not consider wars legal just because they were fought against non-Christians.<sup>3</sup> Vitoria pleaded that non-Christian nations in America were not the objects of conquest but nations with legitimate princes and that the wars against them could only be waged for a just cause.<sup>4</sup>

In classical writings there is nothing to suggest that the law of nations applied differently to different nations. Grotius treated international law as universal and secular natural law as applicable to all states. Wolff also referred to the universal society of mankind governed by the law of nations and affirmed that treaties could be concluded with states irrespective of their religion, and 'on the account of a difference in religion no nation can deny to another the duties of humanity which nations owe to each other'.<sup>5</sup> Vattel shared this attitude.<sup>6</sup> Both of these thinkers conceived the law of nations as universal law derived from human nature, based on the equality of nations

<sup>2</sup> E. Nys, *Les origines du droit international* (1894), at 8–9; A. Nussbaum, *A Concise History of the Law of Nations* (1954), at 86.

<sup>3</sup> Nys, *supra* note 2, at 151–159.

<sup>4</sup> Vitoria, 'De Indis', in F. Vitoria, *Political Writings* (1991), at 233; Nussbaum, *supra* note 2, at 80–81.

<sup>5</sup> C. von Wolff, *The Law of Nations Treated According to a Scientific Method* (1934), at 11–15, 224.

<sup>6</sup> E. de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (1916), at paras 10–12, at 4–6.

irrespective of their cultural and religious background and not admitting of the conceptual possibility of excluding certain nations from its ambit.

Doctrinal attempts to identify European international law relate to developments in the period from the 1648 Peace of Westphalia to the First World War. In the 18th century Moser developed the idea of the European law of nations, but did not conceive it as an exclusive system; he denied European nations any right to infringe on the sovereignty of other countries in a manner that was inconsistent with the law of nature. Whatever the tenets of the positive European law of nations, the law of nature did not allow European powers to establish colonies against the will of the communities concerned.<sup>7</sup> The concept of 'public law of Europe', introduced in the 18th century by French, Spanish and German legal scholars, referred mainly to treaty practice among European states.<sup>8</sup> These teachings were not necessarily exclusivist, but engaged in descriptive analysis of treaty practice.

The idea that international law had a specifically European character was most actively and fully developed in and around the 19th century. It became conventional wisdom that international law developed through European treaties and customs, and that non-European countries did not participate in its development.<sup>9</sup> This approach contradicts the classic conception of the universal law of nations.

It has been suggested that the emphasis on the European character of international law was generated during the period of triumph of the positivist approach to international law over the hitherto dominant natural law school. Positivism generated the distinction between civilized and non-civilized nations and the exclusion, on that basis, of non-civilized nations from international law.<sup>10</sup> This could be true in logical and conceptual terms because the positivist attitude to international law, which admits the existence of legal rules only if consented to by states, could facilitate the emergence and operation within a certain group of states of the legal framework based on exclusivity in accordance with the will of states that compose that group. This, however, would require an empirical analysis aimed at proving that such exclusivity has indeed been established through the expression of the will of the relevant states in the sources of international law. But doctrinal approaches emphasizing the European character of international law rarely undertook an empirical analysis to support their thesis, but referred to cultural, ethnographic, psychological and sociological, that is extra-legal, considerations. Therefore, the emphasis on the European character of international law is connected with the rise of positivism only in chronological, not in conceptual, terms. Moreover, not all proponents of European international law were necessarily positivists.

<sup>7</sup> Alexandrowicz, 'Treaty and Diplomatic Relations between European and South Asian Powers in Seventeenth and Eighteenth Centuries' [1960] II *RdC* 285.

<sup>8</sup> W. Grewe, *Epochen der Völkerrechtsgeschichte* (1988), at 23, 47–49.

<sup>9</sup> Alexandrowicz, 'The Afro-Asian World and the Law of Nations (Historical Aspects)' [1968] I *RdC* 123–125.

<sup>10</sup> C.H. Alexandrowicz, *European-African Confrontation. A Study in Treaty Making* (1973), at 6, 21; Alexandrowicz, *supra* note 9, at 125, 164; A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), at 52ff.

To illustrate the essence of the idea of European international law it is necessary to examine how this idea was developed by its proponents. Among English-speaking jurists, Wheaton contended that international law had always been limited to civilized and Christian people of Europe or to those of European origin.<sup>11</sup> Wheaton denied the existence of the universal law of nations which all mankind, savage and civilized, Christian and Pagan, recognized, professed to obey, or in fact, did obey. He admitted that the law of nations could apply outside Europe, but that it was necessarily inferior to European international law.<sup>12</sup> This attitude implies a perception of inequality and exclusion of those who find themselves at lower stages of civilization.

The relevance of civilization in terms of the ambit of the law of nations and its limitation to nations of European origin was most vigorously developed by Lorimer, whose approach to international law was based on natural law conceptions which teach that all rights and duties have their origin in, and are limited by, the facts of natural life.<sup>13</sup> Consequently, 'Law of nations is the law of nature, realised in the relations of separate political communities.'<sup>14</sup> Lorimer denied that international law could exist at earlier stages of history and argued that '[e]ven now the same rights and duties do not belong to savages and civilised man'.<sup>15</sup> To contradict the idea of universality of international law, Lorimer developed his idea of recognition and pointed out how nations with different levels of civilization can participate in the international legal system:

The sphere of plenary political recognition extends to all the existing States of Europe, with their colonial dependencies, in so far as these are peopled by persons of European birth or descent; and to the States of North and South America which have vindicated their independence of the European States of which they were colonies.

The sphere of partial political recognition extends to Turkey in Europe and Asia, and to the old historical States of Asia which have not become European dependencies—viz., to Persia and the other separate States of Central Asia, to China, Siam, and Japan.

The sphere of natural, or mere human recognition, extends to the residue of mankind, though here we ought, perhaps, to distinguish between the progressive and non-progressive races.

It is with the first of these spheres alone that the international jurist has directly to deal. [However, he] must take cognisance of the relations in which civilised communities are placed to the partially civilised communities which surround them. He is not bound to apply the positive law of nations to savages, or even to barbarians, as such; but he is bound to ascertain the points at which, and the directions in which, barbarians or savages come within the scope of partial recognition. In the case of the Turks we have had a bitter experience of extending the rights of civilisation to barbarians who have proved to be incapable of performing its duties, and who possibly do not even belong to the progressive races of mankind.<sup>16</sup>

These criteria are not based on empirical evidence of the norms and principles of international law, but on certain assumed perceptions, or even prejudices, as to how

<sup>11</sup> H. Wheaton, *Elements of International Law* (1866), at 17–18.

<sup>12</sup> *Ibid.*, at 18.

<sup>13</sup> J. Lorimer, *The Institutes of the Law of Nations* (1883), i, at 4.

<sup>14</sup> *Ibid.*, at 20.

<sup>15</sup> *Ibid.*, at 12–13.

<sup>16</sup> *Ibid.*, at 101–102.

differentiated the application of international law should be with regard to different nations. Genetic and racial characteristics of nations are among Lorimer's principal considerations.

Lorimer further argued that even when diplomatic relations have been established between a semi-barbarous state and a civilized state, recognition of the former does not extend to its municipal law, either public or private, except as regards its own citizens within its own frontiers. The recognizing states consequently maintain separate courts, exercising within the borders of the partially recognized state what is known as consular jurisdiction, to adjudicate on 'all questions between the citizens of the recognising States, *inter se*, and, in many cases, between them and the citizens of the partially recognised State'.<sup>17</sup>

Barbary states could never be recognized by European nations because, so Lorimer attributed to them, they are burdened by their criminal intention and the consequent absence of rational will. Therefore, the conquest of Algeria by France was not a violation of international law; it was 'an act of discipline which the bystander was entitled to exercise in the absence of police'. Had Algeria come to respect the rights of life and property, its history would not have permanently deprived it of the right to recognition. In addition, if a European state annexes a non-European state, then 'Law follows fact very closely, and a very short prescription will give an international title'.<sup>18</sup> At the same time, Lorimer advocated the forcible domination over what he called semi-barbarous states:

Colonisation, and the reclamation of barbarians and savages, if possible in point of fact, are duties morally and jurally inevitable; and where circumstances demand the application of physical force, they fall within necessary objects of war. On this ground, the wars against China and Japan, to compel these countries to open their ports, may be defended.<sup>19</sup>

Lorimer had to confront the realities of international life, including the fact that European nations had legal relations with non-Europeans and would even, as was the case with Turkey, admit them into the European family of nations. On this Lorimer observed that Turkey's position was 'anomalous' and complained that the 1856 Treaty of Paris, which admitted Turkey to the advantages of the public law of Europe, placed British and Turkish representatives on an equal footing: 'It is scarcely possible to imagine a more absurd or even ludicrous result of the failure of positive international law to recognise the relative side of the doctrine of recognition.'<sup>20</sup> Lorimer went on to argue that '[s]emi-barbarous States like China, Turkey and Japan, whose municipal law and the judgments of whose courts are not recognised by civilised nations' were excluded from full participation in international law.<sup>21</sup>

The works of Westlake do not reveal any direct influence by Lorimer, but certainly express an identical social sentiment, which in all probability shaped the attitude of

<sup>17</sup> *Ibid.*, at 216–217.

<sup>18</sup> *Ibid.*, at 161.

<sup>19</sup> *Ibid.*, ii, at 28.

<sup>20</sup> *Ibid.*, i, at 216, 239–240.

<sup>21</sup> *Ibid.*, at 218–219.

both authors. According to Westlake, international society, which develops international law by means of its controlling opinion, ‘is composed of all the States of European blood, that is of all the European and American States except Turkey, and of Japan’. At the same time, some Christian countries, such as ‘Abyssinia, backward in civilisation’ and ‘the little republic of Liberia’, cannot contribute to the development and enforcement of international law.<sup>22</sup> Westlake referred to international society as being identical to European society, and considered that the norms of international law could emerge if the ‘general consensus of opinion within the limits of European civilisation is in favour of the rule’.<sup>23</sup> International society, thus composed, ‘exercises the right of admitting States to parts of its law without admitting them to the whole of it’.<sup>24</sup>

Westlake acknowledged that non-European countries were treated on the level of ordinary international law in their relations with European states; they maintained treaty and diplomatic relations with European states, could acquire territorial title and could benefit from the laws of war in the same way as European states. Nevertheless, ‘Turkey and Persia, China, Japan, Siam and some other countries have civilisations differing from the European’ and this required that Europeans and Americans in such countries be protected by separate legal systems under their consuls. European habits and traditions are based on monogamous marriage and respect for women, Westlake argued, and such habits cannot be protected by judiciaries in non-European civilization.<sup>25</sup> To allow such consular jurisdiction to function, the territorial states should maintain regular law and order; if not, then ‘the position of foreigners would be so untenable that either their conquest of the country in question or the termination of their residence in it would soon follow’.<sup>26</sup>

Westlake understood international law as a tool for ensuring the supremacy of the interests of ‘peoples of European blood’ over those of the inhabitants of the territories they colonized. ‘The white man’s needs’ was of paramount concern and required the establishment in the native areas of a government that suited those needs, a government which the natives were not intelligent enough to understand. What they could understand though was the concept of property and they were able to transfer the property title to the whites ‘with full knowledge of what they were doing’.<sup>27</sup> Agreements with native chiefs, Westlake declared, ‘ought to be strictly limited to the things which the natives can understand, among which property and its transfer are commonly to be found’.<sup>28</sup> Westlake did not specify whether there was anything else, apart from property transfer, that natives were capable of understanding.

In treating the problem of international legal personality, Oppenheim spoke of the category of ‘full-Sovereign States’, each one of equal standing, although Turkey’s position was anomalous due to the regime of capitulations that operated there. But

<sup>22</sup> J. Westlake, *International Law* (1904), Pt. 1, at 40.

<sup>23</sup> J. Westlake, *Chapters on the Principles of International Law* (1890), at 78.

<sup>24</sup> Westlake, *supra* note 22, at 40.

<sup>25</sup> Westlake, *supra* note 23, at 101–102.

<sup>26</sup> Westlake, *supra* note 22, at 41; Westlake, *supra* note 23, at 82.

<sup>27</sup> Westlake, *supra* note 22, at 104–107.

<sup>28</sup> *Ibid.*, at 121.

'doubtful was the position of all non-Christian States such as China, Korea, Siam, Persia, and further Abyssinia', even if Christian.

Their civilisation is essentially so different from that of the Christian States that international intercourse with them of the same kind has been hitherto impossible. And neither their Governments nor their population are at present able to understand the Law of Nations and to take up an attitude which is in conformity with all the rules of this law.

Such states could not, according to Oppenheim, be full international persons: their personality covered only those areas in which they were accepted by the 'Family of Nations'. In other fields, especially with regard to war, they were treated by Christian powers according to discretion.<sup>29</sup> Therefore, the key to Oppenheim's approach was the cultural and religious difference of non-European nations, which ultimately rendered them so intellectually inferior as to be unable to understand international law. Hall likewise excluded uncivilized and semi-civilized nations from the ambit of international law, arguing that such barbarous communities were not mature enough for the administration of European law as between themselves.<sup>30</sup>

Among German writers, the idea of European international law as a system separate from or specific to general international law was advanced by Georg Friedrich von Martens, who considered that states were guided in their external relations by natural law, which formed their external public law, and which in its turn was part of the law of nations.<sup>31</sup> However, natural law did not suffice to govern relations between nations. Positive law of nations mitigated the rigours of natural law, determined doubtful points, regulated on matters upon which natural law was silent, or altered on a reciprocal basis the universal laws established by natural law for all nations. This positive law of nations rested on conventions, whether express or tacit, or usages. In this sense, nothing prevented European states from agreeing to determine their reciprocal rights through general conventions, or even to federalize. There could be a positive code binding all European states. But never, not even at congresses such as those of Westphalia, Utrecht, Vienna or Aachen, were such conventions drafted. A positive European law of nations did not exist, and has never existed, in this sense.<sup>32</sup>

Nevertheless, Martens qualified his science as a European positive law of nations. He emphasized that the law of nations of Turks was different from that of Christian Europeans, and that of the United States was essentially assimilated with it. The mores of other peoples in other parts of the globe, including civilized ones, differed from 'our' mores, and there could be no law of nations understandable for all civilized nations. There was no universal positive law of nations for all nations of the universe. If there were any society on a universal plane, this would then be a natural society governed by natural and not positive law. Martens criticized Wolff for advocating the idea of *civitas maxima* to explain positive laws based on the presumed will of its members.<sup>33</sup>

<sup>29</sup> L. Oppenheim, *International Law* (1905), i, at 147–149.

<sup>30</sup> W.E. Hall, *International Law* (8th ed., 1924), at 150–151.

<sup>31</sup> G.-F. von Martens, *Précis du droit des gens moderne de l'Europe* (1831), at 40.

<sup>32</sup> *Ibid.*, at 42–44.

<sup>33</sup> *Ibid.*, at 49–50.

Another German writer, Bluntschli, also took universalist precepts as a starting-point. Bluntschli considered that the sense of law (*Rechtsgefühl*) is inherent to every kind of human interaction that requires reciprocal respect for ensuing rights; it is a quality of the human soul and although it exists among barbarians too, it has only fully developed among civilized peoples. Bluntschli linked a sense of law to human nature, and hence international law, too, has its roots in human nature. International law is a legally necessary order.<sup>34</sup> At the same time, international law is a product of the civilized world, or Western Europe, most importantly of Germanic and Romanic races. Although treaties had been concluded with Turkey over the centuries, only at the 1856 Paris Congress was Turkey accepted into the European community of nations, which serves as a recognition of universal character (*der allgemeinemenschliche Charakter*) of international law. Since then, Bluntschli argued, the frontiers of international law no longer overlap with those of Christianity, even though it owes some of its ideas and principles to Christianity.<sup>35</sup>

Nevertheless, according to Bluntschli, the civilized nations of Europe and America are called, and are entitled to develop, a common legal conscience of mankind. International law is a product of their civilization and the supremacy of their civilization entitles them to act as bearers and protectors of international law (*Träger und Schirmer des Völkerrechts*).<sup>36</sup> While Bluntschli suggested that European congresses do not carry the authority of a world congress, they speak, in the event of unanimity, with the authority of contemporary European legal conscience.<sup>37</sup>

But again, Bluntschli suggested that international law is not limited to the European family of nations, but extends to the entire globe as far as it can affect people. This is the case, according to Bluntschli, in terms of the opening up of Asian empires to Western trade, which he considered to be an abolition of the privileges which the relevant states possessed inconsistently with international law.<sup>38</sup> The only limitation on European power in relation to non-Europeans that Bluntschli expressly recognized was the impermissibility of the forcible massacre of aboriginal barbarians.<sup>39</sup> Although generally a state could not perform sovereign activities in the territory of another state, this principle was more completely recognized in the relations among European and American civilized nations than in relation to barbaric nations or nations whose civilization was remote to that of European countries.<sup>40</sup>

Heffter understood international law as the law governing the reciprocal relations of states, also denoted as external public law (*äußeres Staatsrecht*), as opposed to internal public law. International law, for Heffter, does not exist for all states of the globe. In his view, it developed only within the circle of certain states and was rooted

<sup>34</sup> J.-C. Bluntschli, *Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt* (1868), at 1.

<sup>35</sup> *Ibid.*, at 15–17, 55–56.

<sup>36</sup> *Ibid.*, at 55.

<sup>37</sup> *Ibid.*, at 103.

<sup>38</sup> *Ibid.*, at 56–57.

<sup>39</sup> *Ibid.*, at 66.

<sup>40</sup> *Ibid.*, at 86.

in the conscience of Christian Europe and European-originated states. Hence it is qualified with the adjective 'European'.<sup>41</sup>

Heffter argued that international law based on mutual recognition was possible only among those states for whom reciprocity of application had been established. An express provision, such as a convention, was not necessary. The character of individual states could suffice in order to assume that one could count on reciprocal treatment and the application of norms. Therefore, the argument went, international law is rooted in Christian states whose morality is based on the supreme laws of humanity. In relation to non-Christian states, international law could only be partly applied and relations with them had to be judged solely in terms of morality and politics.<sup>42</sup> Heffter's later editions further specified that it was political convenience, not law, that governed relations with non-Christians. Only after its acceptance into the European public law system did it become possible to speak of observance of the norms of European international law in relation to Turkey. With other Muslim states this was not the case.<sup>43</sup> International law cannot be applied to savage or half-civilized peoples who do not respect the principles of 'our' international law.<sup>44</sup>

As for sources of such European international law itself, Heffter advanced mutually contradictory arguments. At one point Heffter suggested that psychology and the common history of European nation-states, especially their customs and mores, confirmed the existence of their common international law. The affairs and treaties of European states were the most preferable sources of identification of international law.<sup>45</sup> In a later edition, Heffter argued that European international law is an unwritten law. It is not codified. It may be examined only in terms of historical process.<sup>46</sup>

According to Holtzendorff, the emergence and development of international law was necessarily linked to a certain cultural community (*Kulturgemeinschaft*). There could be no international law among barbarian tribes or between them and civilized states. International law, Holtzendorff argued, does not govern relations with those half-civilized states which opened their doors to foreign interaction by submitting to the overwhelming power of European governments. International law is, according to Holtzendorff, a cultural requirement of those civilized states which recognize and practise it in their morally justified interests.<sup>47</sup>

As long as there are essential differences between the consciences of nations, characterized in European history, psychology and ethnography as barbarism, half-culture and civilization, Holtzendorff declared, there can be no international law that extends to the whole of humankind. This historical limitation of international law entails the

<sup>41</sup> W.-A. Heffter, *Das Europäische Völkerrecht der Gegenwart* (1844), at 1–2.

<sup>42</sup> *Ibid.*, at 11–12; the similar approach is maintained in later editions of Heffter's treatise: see Heffter (2nd edn., 1848), at 14; Heffter (3rd edn., 1855), at 13–14; Heffter (6th edn. by H. Geffcken, 1882), at 19–20; Heffter (7th edn. by H. Geffcken, 1888), at 22–23.

<sup>43</sup> Heffter (1882), *supra* note 42, at 20; Heffter (1888), *supra* note 42, at 23.

<sup>44</sup> Added in Heffter (1882), *supra* note 42, at 2.

<sup>45</sup> Heffter, *supra* note 41, at 14.

<sup>46</sup> Heffter (1848), *supra* note 42, at 15.

<sup>47</sup> F. von Holtzendorff, *Handbuch des Völkerrechts* (1885), i, at 11.

concept of European international law, which emerged in Europe. Holtzendorff accepted that European culture may not necessarily be superior to others, such as the Asian and Hellenic cultures, but pointed out that European culture was supported by immense power. There could in principle be an Asian international law, but only if it were based on different norms and principles to those of European international law. If this is not the case, European international law merely confronts the stateless parts of mankind.<sup>48</sup> European international law could include only those states which historically form part of it or those non-European states, such as Turkey in 1856, which had been accepted in it by the European concert of nations. Such states are part of the system known as the international law of civilized states. Interaction on the part of these states with Asian states is by means of power.<sup>49</sup>

French-speaking writers enthusiastically followed the vision of European international law based on European cultural and racial superiority. Bonfils linked international law to the concept of civilization as, in his view, international law could only exist in a stable community of nations possessing a certain degree of civilization.<sup>50</sup> He argued that natural or rational international law applies to all peoples as a matter of necessity of interaction among nations and exists independently of express and tacit conventions as the expression of the common will of states. Such rational law applies even to the barbarians of Africa and civilized states are not permitted to breach that law in relation to uncivilized nations. Bonfils stated that civilized states have often abused their power and violated the principles of rational law in relation to nations of different cultures.<sup>51</sup>

Positive international law is, in Bonfils' view, the product of Europe and has developed through the application of Christian principles. This law applies only to those nations that have developed the necessary degree of civilization; in other words, to nations of European origin. This is a juridical system established by nations which demonstrated the superiority of their talents in arts, science and commerce, as well as in politics and government. Such nations are united by religion, customs and morals and ultimately by their custom of entering into treaty and diplomatic relations with one another. Bonfils disagreed with Puffendorf, who considered international law to be cosmopolitan and applicable to all. Instead, he shared John Stuart Mill's idea that international law cannot apply to barbarians because this would imply a reciprocity of rights for which there are no conditions in relations with barbarians.<sup>52</sup>

Rivier suggested that the law of nations, which presupposes a common legal conscience among its constituents and an advanced level of civilization, cannot function between Europeans and inferior races divided by a gulf comparable to that between the Ancient Greeks and barbarians, a gulf which separates Europeans from inferior races, barbaric and half-civilized states or states with different levels of civilization.

<sup>48</sup> *Ibid.*, at 12–13.

<sup>49</sup> *Ibid.*, at 14–17.

<sup>50</sup> H. Bonfils, *Manuel de droit international public* (1894), at 5–6.

<sup>51</sup> *Ibid.*, at 20.

<sup>52</sup> *Ibid.*, at 20–22.

Rivier referred to European nations as preferably civilized nations, because their civilization is 'ours' – that is, European. These nations are superior and relations among them are based on the reciprocity of rights.<sup>53</sup> The society of nations consists of European nations, especially those speaking Germanic and Romanic languages, as well as Slav nations, Romania and Greece, and Turkey, the last of which was accepted into the advantaged fold of the public law of Europe and European concert by the decision of the 1856 Paris Congress. Other Asian states and Christian Abyssinia were excluded from this society of nations.<sup>54</sup>

Nys similarly divided the population of the world into civilized, barbaric and savage peoples. International law is a European creation, he declared. No comparison can be made between the multiplicity of juridical relations established among civilized nations and the rare applications of law between them and barbarians and savages.<sup>55</sup>

All this confirms well enough that the idea of European international law as an idea of exclusivity and superiority does not necessarily owe itself, contrary to some authors' views, to the dominance of positivism. The proponents of European international law based their views not on empirical evidence, but on the assumptions and prejudices of racial, cultural and religious superiority of Europeans over non-Europeans. Moreover, some proponents did, as we have seen, accept the relevance of natural law, and most of them spoke of European cultural and racial, and hence juridical, superiority in terms of their beliefs of what constitutes the nature of things.

Obsession with the European character of international law went so far that some writers tried to present their own attitude as the attitude of the legal system, dismissing the response of the system as inappropriate. This can be seen in Lorimer's criticism of arrangements of positive law by reference to what he considered as the natural state of things,<sup>56</sup> or in Westlake's contention that international law must treat certain peoples as uncivilized so that 'civilised' states can benefit from this,<sup>57</sup> rather than pointing to the positive and empirical proof that it in fact does treat them so. These and other similar contentions appeal to extra-positivist factors, conceivably natural law as perceived, or perverted, by the relevant authors, rather than as sources and evidence of positive law.

The idea of European international law was part of the ideology of colonialism. Colonial expansion and exploitation found no explanation in the classical law of nations,<sup>58</sup> which embodied the principles of universality and uniformity and recognized the equality of nations. But in the 19th century, non-European countries were viewed either as objects of colonization or as attractive markets. Given this, a radical reinterpretation, or vulgarization and perversion, of the doctrine of natural law took place in 19th-century writings, presenting non-European nations as naturally unfit to be part of the Family of

<sup>53</sup> A. Rivier, *Principes du droit des gens* (1896), at 8–9, 13–14.

<sup>54</sup> *Ibid.*, at 10–11.

<sup>55</sup> E. Nys, *Le droit international. Les principes, les theories, les faits* (1904), at 1–3.

<sup>56</sup> *Supra* note 20.

<sup>57</sup> Westlake, *supra* note 23, at 143.

<sup>58</sup> Alexandrowicz, *supra* note 7, at 286.

Nations due to their lack of civilization. Writers like Lorimer, Holtzendorff and Westlake relied on certain constructed natural states of things to provide approval for civilizational difference and its implications, hence justifying international law under which colonial wars and annexations, as well as wars for opium markets, were legal.

To illustrate this attitude, Westlake advocated international law which justifies taking possession of non-European countries and their resources against the will of their inhabitants. His vision of international law was also hostile to the concept of aboriginal rights, especially to the proposals of John Kasson, the US representative at the 1884–1885 Berlin Conference on Africa, who argued that international law should recognize the right of native tribes to dispose freely of themselves and their territory, their consent should be obtained for their territory and land to be taken into possession and acts of violence to ensure occupation were inconsistent with principles of justice and international law.<sup>59</sup> In accordance with his attitudes towards aboriginals as being culturally inferior, Westlake considered that the treaties of cession concluded with natives could not form the basis of an international title. Westlake disapproved of the practice of concluding treaties with native rulers because the natives were not intelligent enough to understand the subject-matter of such treaties. ‘The nature of the case’ (including the establishment of effective administration) could instead justify the title.<sup>60</sup> There seems to be no limitation envisaged as to the means used.<sup>61</sup> With regard to the extent of freedom that European international law gave Europeans in their treatment of non-Europeans, Bonfils did not admire the forcible domination of Europeans over non-Europeans, while Lorimer, Westlake and Holtzendorff would consider this point irrelevant, and Bluntschli only disapproved the arbitrary massacres of non-Europeans.

The thrust towards colonial acquisitions and the obsession with the idea of international law facilitating this aim even caused the proponents of European international law to make points that were incompatible with their mainline argument. Such was the view of the exclusion of Christian Abyssinia as a potential object of conquest and colonization by European powers, even if international law was arguably based on Christianity. This caused Abyssinia to fight wars, but similar sentiments also caused the Italian annexation of Abyssinia in 1935 – the event which generated irreparable cracks in the League of Nations system. In addition, while keeping Abyssinia out and approving Algeria’s annexation, the school of European international law had analogously treated Poland – a European State divided among Austria, Prussia and Russia. WE Hall preached that in the interests of stability of international order and because of the lapse of time, Poland’s partition was legitimized as being permanent.<sup>62</sup>

<sup>59</sup> Westlake, *supra* note 23, at 137–139; see also Anghie, *supra* note 10, at 92–93.

<sup>60</sup> Westlake, *supra* note 23, at 144–145, 149–150; Westlake, *supra* note 22, at 121.

<sup>61</sup> Westlake’s attitude anticipated the Privy Council’s holdings that the conquest of a territory in Africa, even if it had previously been recognized by Britain as sovereign, practically entitled the annexing power to acquire the property title to land, because native land rights were uncertain. The case concerned a territory annexed pursuant to British economic interests: *In re Southern Rhodesia* [1919] AC 211, analysed in Alexandrowicz, *supra* note 9, at 202–205.

<sup>62</sup> Hall, *supra* note 30, at 143.

The argument that the existence of consular jurisdiction and capitulations in non-European states caused their exclusion from (European) international law is also inconsistent. The need to protect the customs of Europeans in non-European countries could be legitimate factors in some circumstances, but they had absolutely nothing to do with the ambit of international law. Legal relations covered by consular jurisdiction are matters of domestic law, and if they were subject to local jurisdiction in the absence of consular jurisdiction, they would trigger issues of private international law in terms of which law should apply in a given contractual or family relation, not of public international law regulating the relations between sovereign states.

A similar conceptual confusion is observable in the way that Lorimer linked the recognition of a state with its internal legal order and consular jurisdiction over foreigners. But Lorimer's concept of 'recognition' bears no resemblance to the recognition of states in international law. The real concept of recognition deals with the status of a state, while the treatment of foreigners in the state's internal legal order is a matter for the further process of diplomatic protection and state responsibility. International law has always been clear on that distinction. In addition, consular jurisdiction can be explained as an implication of the local sovereign's territorial supremacy and has nothing to do with the degree of civilization. Writing from the perspective of the universal law of nations, Vattel affirmed that 'there exists no reason why a nation, or a sovereign if authorised by the laws, may not grant various privileges in their territories to another nation, or to foreigners in general, since every one may dispose of his own property as he thinks fit'.<sup>63</sup>

There was consensus among the proponents of European international law regarding the basic characteristics of their ideology, effectively translated into the common European legal attitude and conscience regarding the origin and scope of international law and relations between Europeans and non-Europeans. Their writings certify that the idea of European international law was an idea of the racial superiority of Europeans over non-Europeans, who were considered uncivilized and unable to understand international law. Reciprocal observance of international law was therefore inconceivable. International law could be made and enforced only by those who were racially superior; those who were racially inferior could not take part in its development. The only relationship between Europeans and non-Europeans considered acceptable within the idea of European international law was the domination of the former over the latter, including the imposition of unequal treaties, subjection to protectorate, or colonization and annexation.

Emphasis on the European character of international law thus understood seems to have reflected the general social and juridical sentiment in different countries of contemporary Europe. Those were times when the German Reichstag aggressively reacted to Mathias Erzberger's plea that Hottentots also have souls. Few ideas were more popular among, and commonly approved by, European jurists as the idea of the

<sup>63</sup> E. Vattel, *The Law of Nations or the Principles of Natural Law applied to the Conduct and to the Affairs of Nations and of Sovereigns* (1811), at 168.

racial, cultural and intellectual superiority of Europeans over non-Europeans. Lorimer's teachings, 'paradoxical, backward and heavily prejudiced'<sup>64</sup> as they were, especially his division of mankind into civilized, barbaric and savage nations, were nevertheless cherished by continental European jurists like Rivier, Nys and Holtzendorff, endowed with systematic form and thus moulded into the tradition of European academic thought. Ernest Nys even dedicated his *Origines du droit international* to Lorimer.

### 3 The Idea of European International Law Tested against Practice

#### A *The Non-European Origins of International Law*

The thesis put forward by the proponents of European international law that non-Europeans were incapable of understanding international law was based on pure prejudice. Their writings ignored the fact that the cultural and intellectual heritage of non-European nations had long embraced and developed fundamental ideas of international law. Kautilya's *Arthashastra* and the Code of Manu, to mention only a couple of examples, provide evidence of non-European concepts of the sanctity of treaties, inviolability of ambassadors, principles of humanity in conducting wars and fundamental principles of the law of the sea, which, it may be noted, anticipated to a certain extent the modern law of the sea. Ancient Greeks praised the generosity of the Indian conception of the laws of war, which was based on a fundamental distinction between combatants and non-combatants.<sup>65</sup>

To emphasize the differences with and civilizational superiority over, non-Europeans, the proponents of European international law singled out nations for their illegal practices and cited these as grounds for their exclusion from international law. Thus, Lorimer justified the freedom of action towards what then were called 'Barbary States' in North Africa, up until their annexation. Yet this attitude overlooked the fact that European nations such as France and Britain also engaged in official or quasi-official piracy in the Caribbean.<sup>66</sup> Indeed, whether North African piracy or French atrocities in Algeria subsequent to its annexation was more barbarous remain open to question.

Descriptions of international legal history presented by the major proponents of European international law in their treatises were in a way irreconcilable with historical reality: they asserted that international law was a European development and that other states became its subjects only if and when they were admitted into the European family of nations.<sup>67</sup> For instance, Heffter focused exclusively on the intra-European

<sup>64</sup> Nussbaum, *supra* note 2, at 239.

<sup>65</sup> A. Verdross, *Völkerrecht* (1964), at 79; A. Wegner, *Geschichte des Völkerrechts* (1936), at 6; C.H. Alexandrowicz, *An Introduction of the Law of Nations in the East Indies* (1967), at 62.

<sup>66</sup> Verdross, *supra* note 65, at 65.

<sup>67</sup> Alexandrowicz, *supra* note 65, at 10.

context, starting with ancient Greece and ending with the 19th century.<sup>68</sup> Writers like Bluntschli and Oppenheim did not account for international legal developments in Asia and Africa.

The practical side of history demonstrates that international law has been as Asian or African as it has been European. The first instruments and institutions of international law identified to date originate outside Europe. Sumer cities in the third and second millennia BC had a system of treaty law and recognized the immunities of diplomatic representatives.<sup>69</sup> The Treaty between the Kingdoms of Lagash and Umma, concluded around 2500 BC, established boundaries between Lagash and Umma, as well as providing for arbitration on possible differences, and designated the ruler of a third country as an arbitrator. The Treaty of friendship between Lagash and Uruk was concluded during the same period.<sup>70</sup>

The wars in the ancient Middle East brought about a treaty system among the regional powers, whereby they terminated wars, concluded peace agreements and apportioned spheres of influence among themselves. Such a treaty was also concluded between the Hittite Kingdom and the Rulers of Amuru and provided for a mutual trade embargo against the Assyrians.<sup>71</sup> Middle Eastern powers also had reciprocal treaty obligations regarding extradition of political prisoners, for example, a treaty concluded in the 14th century BC between the Hittites and the Hapalla Kingdom.<sup>72</sup> Treaties between Egypt and the Hittite Kingdom in 1354 and 1312 BC dealt with the division and allocation of the spheres of influence.<sup>73</sup>

The wars between the Hittite Kingdom and Egypt at the end of the 14th century BC ended with the 1280 Peace Treaty, which was a quite complex arrangement covering several fields of international legal cooperation as well as reciprocal respect for the interests of the two states. The treaty allocated respective spheres of influence, established a military alliance between the two states, and provided for the reciprocal obligation of providing military assistance against external enemies or rebels. Refugees and border trespassers were to be extradited but not punished after extradition. These treaty obligations were laid down as reciprocal obligations.<sup>74</sup> No doubt, such treaties embodied fully-fledged legal obligations which allowed for legal certainty in inter-state relations, and in which the states could place their confidence.

Similar legal environments persisted in the Middle Ages, as evidenced by Chinese treaty practice. The 783 Treaty of Peace, Friendship and Border between China and Tibet provided for Chinese territorial cessions to Tibet. This was reaffirmed in the 822 Treaty between China and Tibet, which recognized the equality of both parties as

<sup>68</sup> For instance, Heffter (1888), *supra* note 42, at 13ff.

<sup>69</sup> D. Bederman, *International Law in Antiquity* (2001), at 23.

<sup>70</sup> Wegner, *supra* note 65, at 2; K. Ziegler, *Völkerrechtsgeschichte* (1994), at 15; Bederman, *supra* note 69, at 139–140.

<sup>71</sup> Wegner, *supra* note 65, at 2; Bederman, *supra* note 69, at 145.

<sup>72</sup> Wegner, *supra* note 65, at 3.

<sup>73</sup> Bederman, *supra* note 69, at 27.

<sup>74</sup> Wegner, *supra* note 65, at 4–5; Verdross, *supra* note 65, at 35; for a detailed analysis see Bederman, *supra* note 69, at 28, 146–150.

international legal persons. The common legal conviction of both parties as to the binding force of such treaties is recorded. They pledged to observe the agreement and transfer it to future generations. Most impressively, the 783 Treaty provided that if either of the parties, Tibet or China, acted in breach of the treaty, then no action that the other party undertook in retaliation should be viewed as a breach of the treaty.<sup>75</sup> This is an amazing anticipation of the modern law regarding reciprocal non-compliance with treaty obligations, both the law of treaties as embodied in Article 60 of the 1969 Vienna Convention on the Law of Treaties regarding reciprocal termination of a treaty in case of material breach and countermeasures in the law of state responsibility.

Chinese treaty practice in the 11th–13th centuries includes treaties dealing with a variety of international legal issues from extradition to territorial arrangements, such as the 1005 Peace Treaty between Sung and Kitan or the 1142 Peace Treaty between Chin and Sung.<sup>76</sup> The Middle East also practised international law, as evidenced by the Ottoman–Persian treaty relations. The 1555 Peace Treaty between these two powers was an important instrument of international law of that time as it allocated spheres of influence to each contracting party, thereby setting up the regional political and legal order that would endure for centuries. This was followed by the Ottoman–Persian Treaties of 1576, 1590 and 1612, which complemented and adjusted the legal positions of Ottomans and Persians under the 1555 Treaty.<sup>77</sup>

## **B Interaction between European and Non-European States**

While international law was both possible and was indeed practised in non-European parts of the world, it was likewise possible and practised in the interactions between Europeans and non-Europeans. From the Middle Ages onwards, political factors in Europe were such that the emphasis on the European or Christian nature of international law could only be nominal. European powers, constantly at war and in conflict with one another, would not accept limitations on their freedom in interacting with non-European powers in order to balance the influence and freedom of action of their own European adversaries; hence, they would not accept that international legal relations be limited to the level of inter-European relations. In addition, European powers had economic as well as strategic interests outside Europe and were keen to establish for themselves arrangements predictably defining the framework of legal relations. Whether this was done through reciprocity of obligations, or in return for a different favour or advantage to non-European powers, or even through forcible imposition of inequality, these arrangements were intended as legally predictable frameworks invocable in the case of non-compliance.

It accords with this general picture that European powers themselves insisted on the universality of international law. After the defeat of the Teutonic Order by the Polish army in the 1410 Tannenberg battle, Paulus Wladimiri who represented

<sup>75</sup> W. Preisner, *Frühe Völkerrechtliche Ordnungen der Aussereuropäischen Welt* (1976), at 175–178.

<sup>76</sup> *Ibid.*, at 178–182.

<sup>77</sup> Alexandrowicz, *supra* note 65, at 91–92; P. Jackson and L. Lockhart (eds), *The Cambridge History of Iran* (1986), vi, at 252, 266.

Poland at the 1414–1418 Constance Council, defended the legality of the alliance of Poland with non-Christian Lithuania against the Christian Teutonic Order. Though not officially approved by the Council, this view nevertheless supported and anticipated the classical authors' attitude of the universality and secularity of international law.<sup>78</sup>

The idea of European exclusivity was also asserted by Popes who, claiming not only spiritual but also secular political and legal supremacy in Europe, introduced the canon-law prohibition of agreements with non-Christian powers, and tried to impose the sanction of nullity on such agreements. France nevertheless concluded in 1535 a treaty with the Ottoman Empire relating to a variety of legal relations, from mutual assistance to capitulations. Pope Paul III reprimanded King Francis I for having entered into treaty relations with infidels. But the King defended his position by reference to the universality of international law. Turks were part of human society due to the links which nature established among human beings and whatever was normal for some human beings could not be strange for others. Even if Turks were separated from Europeans by their usages and tradition, this did not affect their membership in the universal society of nations. Differences of religion and cultural tradition could not destroy the natural association of mankind.<sup>79</sup> Nys described these as glorious words, opening with dignity the modern epoch.<sup>80</sup> This position clearly overlapped with and anticipated the classical writers' conception of universality of international law.

Considerations like those underlying the canon-law prohibitions of treaty-making with non-Christian powers were gradually outweighed by the necessity of interaction between European and non-European powers on the basis of universality. Treaty-makers, whether European or Asian, were guided by their conviction that treaties entered into were binding and should be executed in good faith, and this was accepted in all relevant cultural and religious traditions.<sup>81</sup> The Ottoman Empire concluded numerous treaties with European powers which included, among others, provisions regarding trade and allocation of jurisdiction, which were suitable in a way for fully-fledged international instruments. The Portuguese had extensive treaty relations with Buddhist and Hindu powers in Asia, which also underlined the secularity and universality of international law. In 1685 and 1687 France and Siam concluded a series of treaties covering trade, jurisdiction, activities of Christian missionaries and military cooperation.<sup>82</sup> The 1631 Treaty between Holland and Persia is noteworthy as it provided for reciprocal protection in favour of Dutch nationals in Persia and Persian nationals in Holland. The Persians received jurisdictional and trade privileges comparable to those of Dutch nationals in Persia and also, most importantly, this was

<sup>78</sup> Nys, *supra* note 2, at 150; Alexandrowicz, *supra* note 65, at 84, 94–95. See *ibid.*, 88 on similar attitudes regarding the alliance between Sweden and Turkey.

<sup>79</sup> Alexandrowicz, *supra* note 65, at 89–92, 236; Nys, *supra* note 2, at 161–162.

<sup>80</sup> *Ibid.*, at 163.

<sup>81</sup> Alexandrowicz, *supra* note 9, at 11.

<sup>82</sup> Alexandrowicz, *supra* note 65, at 89, 99, 110–119.

extended to English and Scottish nationals resident in Holland. The Treaty also introduced the position of Persian Agent with immunity and jurisdictional powers over Persians in Holland, and provided for legal cooperation from the Dutch in the event that Persians resisted the authority of the Agent. Furthermore, Persians were also guaranteed free exercise of their religion in Holland and were also, as were Dutch nationals in Persia, exempted from the local sovereign's *droit d'aubaine*, i.e., the right to take a foreigner's property in case of his or her death.<sup>83</sup> Not only is this treaty a perfect example of the universality of international law, but it also confirms that European and Asian powers, governed by the same international law, were able to contract on a basis of equality and reciprocity, treating their nationals on a similar footing.

Treaty relations between France and Algeria in the 17th century also offer some evidence for the universality of international law. The 1628 Treaty referred to both French and Algerian monarchs as emperors; more importantly, the Treaty of 17th May 1666 allowed the Ruler of Algeria to send two envoys to Marseilles to hear complaints in the event of a breach of the treaty. This corresponded to a similar right of French consuls in Algeria. The two states thus interacted on the basis of reciprocity. Similar stipulations were to be found in the 1711 Treaty between France and Tunisia and the 1681 Treaty between France and Tripoli. The 1631 French–Moroccan Treaty provided for the Moroccan Ambassador's capitulatory jurisdiction over Moroccan merchants in France. Moreover, the Moroccan Ambassador enjoyed the same privileges at the French court as the French Ambassador did at the Moroccan court. The 1845 French–Moroccan Boundary Treaty allocated personal jurisdiction to each contracting party over its nationals.<sup>84</sup> There also existed an extensive treaty framework between European and African nations, which demonstrated that natives were able to understand treaty clauses.<sup>85</sup>

As for capitulation treaties specifically, it was common practice in different parts of the world and in different stages of history for local sovereigns to allow foreigners to reside in their territories and be governed by their own laws. This took place in the inter-European and inter-Asian contexts, as well as between Europeans and Asians. From the 8th century, Muslim merchants enjoyed jurisdictional privileges in Hindu states, as did Chinese merchants in Siam and Indonesia. European nations also allocated comparable privileges to each other.<sup>86</sup> This was viewed as an exercise of hospitality or as an implication of sovereign equality of states and their rulers. The country granting capitulation imposed self-restrictions on its sovereignty to promote trade, irrespective of civilization, religion or race of the relevant foreigners.<sup>87</sup> There was nothing inherent in capitulations implying European superiority. In all the available documentation, it seems that only Europeans viewed capitulations as an emanation of their cultural and racial superiority and of the respective inferiority of non-Europeans.

<sup>83</sup> *Ibid.*, at 119–124, 127–128.

<sup>84</sup> Alexandrowicz, *supra* note 10, at 20–22, 27, 59, 83.

<sup>85</sup> *Ibid.*, 49–50. For a list of hundreds of European–African agreements see *ibid.*, at 129–140.

<sup>86</sup> Alexandrowicz, *supra* note 10, at 22; Alexandrowicz, *supra* note 65, at 121.

<sup>87</sup> Alexandrowicz, *supra* note 9, at 157.

In addition, whatever the content of consular jurisdiction and capitulations, the very fact of entering with non-European states into treaties providing for such complex institutions and procedures, which would entail the need of interpretation and application of specific clauses from both sides, necessarily presupposed the existence of universal international law governing that very process of interpretation and application, and thus effectively rebutted the Westlake-Oppenheim attitude on certain nations being unable to understand international law.

Thus, the notion of a differentiation in treaty-making capacity in terms of cultural or religious background does not find support in state practice. The International Court of Justice affirmed this in the *Rights of Passage* case between Portugal and India, where it referred to the 1741 Treaty between Portugal and Maratha governing, on the basis of reciprocity, access of the soldiers of one party to the territory under the other's sovereignty with the local sovereign's permission.<sup>88</sup> The Court also examined the consequences of the 1779 Treaty of Poona concluded between Portugal and the Ruler of Maratha for the territorial rights of Portugal in the Indian territory. The Court affirmed, mainly by reference to the legal conviction of the Marathas, that the treaty was validly entered into and operated. It interpreted Article 17 of the treaty as not transferring sovereignty over the relevant areas to India, but merely rights falling short of sovereignty.<sup>89</sup> It is noteworthy that the Court reached its conclusions not only by affirming that the 1779 Treaty was a full-fledged international treaty but also by referring to the practice and legal conviction of the Marathas, which confirms their legal personality and full participation in the international legal system based on the principles of reciprocity and territorial supremacy.

In terms of state practice, the British and Indians interacted with each other during the 17–18th centuries, and while they sometimes contradicted each other in terms of substance of the applicable law, they nevertheless referred to 'custom that lasted many ages', to 'the law of God and all nations', which governed relations between them as universal international law. When English Governor-General Hastings imposed on the Raja of Benares payments higher than those foreseen under the protection treaty, he was indicted before the Parliament. Speaking against Hastings, Edmund Burke maintained that in consequence of those actions, the Raja was entitled to refuse payment or even consider the treaty as broken and act as dictated by safety and survival. Burke relied on the 'law of nations [that] is the law of India as well as Europe'.<sup>90</sup> Clearer evidence of the existence of the universal law of nations based on the principle of reciprocity irrespective of cultural and racial background of states is hard to imagine.

All this evidence suggests that no specifically European international law has ever existed; it was merely constructed in doctrinal writings by reference to extra-legal factors and circumstances which never possessed any practical significance in inter-state

<sup>88</sup> [1958] ICJ Rep 41.

<sup>89</sup> *Ibid.*, at 37–38. The Court noted that the Marathas regarded the Treaty as valid and binding and gave effect to its provisions through their domestic acts.

<sup>90</sup> Alexandrowicz, *supra* note 65, at 21–22, 77–78.

relations. As Guggenheim emphasized, neither the European continent nor Christianity could deliver the idea of international law because the subject-matter of international legal transactions was the same between Europeans as between European and non-European powers. International law was never restricted to Europe. It was a secular law and its essential norms emerged as universally valid norms.<sup>91</sup>

There are various views as to when European international law came into existence and disappeared. However, this issue is organically linked with the logically anterior question of whether there ever was a European international law in the first place. Nevertheless, the empirical difficulties of establishing the dates of its birth and death present insurmountable hurdles to those who consider that it did exist. Grewe considers that from the early 19th century international law was no longer restricted to Europe, but it became the law of civilized nations, and the European character of international law was no longer asserted.<sup>92</sup> However, the 19th-century proponents of European international law, including Heffter and Holtzendorff, continued to vigorously assert the notion of a European and Christian character of international law in the late 19th century. Nor is Grewe's distinction between European international law and the international law of civilized nations accurate: the proponents of European international law identified civilization with European civilization.

It has also been suggested that two separate periods must be distinguished in terms of legal interaction between Europeans and non-Europeans. Under this view, a single universal law of nations applied both to European and non-European nations in their intercourse from the 16th century. However, from the 19th century, which witnessed Afro-Asian confrontation with Europe and colonization, international law started to abandon its centuries-old universality. European egocentrism left Asians 'outside' civilization and international law shrank to regional dimensions, even though it carried the label of universality. Non-European states which had enjoyed full legal status before the 19th century were reduced to the position of candidates for admission into, or recognition by, the European family of nations.<sup>93</sup> Grewe criticizes this approach by pointing out that even if there were extensive international legal relations between European and non-European nations on the basis of natural law, universal international law still did not exist. European international law stood out as more than a regional system, and from the 19th century it started to become universal international law.<sup>94</sup> Both of these views fail to demonstrate when and how exactly the suggested transformation occurred, which means were employed to make and change international law, and what substantive changes in the content of norms emerged as part of universal international law.

Alexandrowicz refers to the view expressed by the International Court in *Rights of Passage*, namely that the validity of the 1779 Portuguese–Maratha Treaty should not

<sup>91</sup> Guggenheim, 'Das jus publicum europeum und Europa', 3 *Jahrbuch des Öffentlichen Rechts der Gegenwart* (1954) 1, at 2–3.

<sup>92</sup> Grewe, *supra* note 8, at 520, 528, 540.

<sup>93</sup> Alexandrowicz, *supra* note 65, at 2, 10; Alexandrowicz, *supra* note 10, at 6, 117.

<sup>94</sup> Grewe, *supra* note 8, at 545–546.

be judged 'on the basis of practices and procedures which have since developed only gradually', and thus infers the Court's support for the view that universal international law of the 16th to the 18th centuries was replaced by Eurocentric international law in the 19th century.<sup>95</sup> But this conclusion is misleading because the general scope of applicability of international law, including its reduction to a regional system, was simply not the issue before the Court. The Court made this statement with regard to a totally different point, i.e., India's objection that there was no single mutually attested text of the Treaty,<sup>96</sup> and did so without any regard to what kind of treaty-making standards applied in different parts of the world, still less to whether the international law under which a treaty between Portugal and Marathas was valid subsequently changed into a system in which a similar treaty would no longer be valid.

Political and social circumstances underpinning the universal character of international law at earlier stages were still present in the 19th century, and this would not allow the ideas of European exclusivity to attain practical significance, still less achieve the rank of positive international law. European powers resorted to wars to annex territories or impose unequal treaties on non-European nations, such as the Opium War against China. This social, economic and political sentiment obviously impacted on the way that international legal doctrine was shaped in the 19th century. But it did not change the international legal system as such because in practice the European powers were not prepared to adopt a consistent attitude of exclusivity – they still had to conduct relations with a number of non-European powers on the basis of international law. There were, for instance, treaty relations with Turkey even before its admission to the 'public law of Europe'. The 1841 Constantinople Straits Convention was concluded with the participation of Turkey.<sup>97</sup> The French–Moroccan Boundary Treaty was concluded in 1845. In 1888, Great Britain concluded treaties with several African Kingdoms in which it was stated that those kingdoms were perfectly independent and paid no tribute to any power.<sup>98</sup>

Not even the unequal treaties stipulated with China after the Opium War were based on the concept of exclusivity. Lord Palmerston described the Chinese confiscation of all British-owned opium as 'a gross outrage to international law' and Britain indeed went to war to ensure the future security of its opium trade. The outcome of this war was the 1842 Treaty of Nankin, which embodied Palmerston's intentions.<sup>99</sup> Whatever the merits of Palmerston's attitude, he clearly affirmed that international law was applicable between China and Britain. Likewise, whatever the content of those inequitable treaties, the very fact of their conclusion presupposed that the law was applicable between European and non-European countries, in this case Britain and China. It also conferred validity to agreements concluded between them, which enabled the parties to place their confidence in these treaties and invoke their provisions in practice.

<sup>95</sup> Alexandrowicz, *supra* note 65, at 8–9.

<sup>96</sup> [1958] ICJ Rep 37.

<sup>97</sup> A.W. Ward and G.P. Gooch, *The Cambridge History of British Foreign Policy 1783–1919* (1923), ii, at 180.

<sup>98</sup> Alexandrowicz, *supra* note 10, at 32.

<sup>99</sup> Ward and Gooch, *supra* note 97, at 218–219.

Such unequal treaties were perhaps contrary to natural law principles regarding the equality of states, as emphasized by classical writers such as Vattel.<sup>100</sup> But their very existence implied a universal international law: if these treaties were legal, this was the law which conferred validity to them; if they were illegal, this was the law which proscribed them. Having legal transactions not governed by the law is simply impossible.

From the 15th century onwards, on the basis of the classical concept of universality, well consolidated in doctrine, the history of international law witnessed the irreversible affirmation of universality and secularity of international law, realized through extensive treaty and diplomatic practice between European and non-European powers. This process affirmed that universality in clear practice and in the attitudes of states. If the 19th century witnessed either a shrinking of international law to a regional European system or the emergence of an elite European subsystem, the proponents of these theses have not yet demonstrated that European powers in fact adopted such a vision of exclusivity and that the rest of the world approved this vision.

### C *The Concept of 'Public Law of Europe'*

A significant implication of the idea of European international law was the notion of 'public law of Europe', which acquired relevance in doctrinal writings, in diplomatic and, to some extent, treaty practice, but was never properly defined. Grewe suggests that public law of Europe was the name of international law in the 18th and 19th centuries as international law in that period had a Christian and European basis. Furthermore, public law of Europe as the legal order of the European family of nations stood out as international law with a more developed content than the nascent general international law, providing a model for it.<sup>101</sup> But Grewe does little to demonstrate the substantive content of public law of Europe. Indeed, Grewe's idea does not hold in the light of practical developments during that period.

Substantive public law of Europe was rarely given a definition. No author actually specified whether it was identical with 'European' international law or whether it embodied norms specifically related to public interest in Europe. The works that introduced the concept did not refer to any free-standing legal system. The 1747 work of Mably on Public Law of Europe was not concerned with legal analysis, but was rather limited to a politico-historical and diplomatic study of major treaties.<sup>102</sup> The works on 19th-century diplomacy have treated 'public law of Europe' either as an empirical description of treaty practice between European states or, and mostly, as a general pattern of European politics,<sup>103</sup> but never as a coherent system of law. Therefore,

<sup>100</sup> Vattel emphasizes that 'every State has the right to forbid the importation of foreign goods; and the Nation which is thus prohibited has no right to complain, as if it had been refused an office of humanity. The complaint would be ridiculous': Vattel, *supra* note 6, at 40; on equality see *ibid.*, at 7.

<sup>101</sup> Grewe, *supra* note 8, at 339–341.

<sup>102</sup> Nussbaum, *supra* note 2, at 139; Ziegler, *supra* note 70, at 195.

<sup>103</sup> H. Temperley, *The Foreign Policy of Canning* (1925), at 464–467; J. Goebel, *The Struggle for the Falkland Islands* (1927), at 120–173.

there is no evidence that public law of Europe meant an identifiable and separate legal system.

There were no juridically identifiable conditions for participation in 'public law of Europe'. The principle that new members could join this system on the basis of acceptance of the European concert was an overstretching of common sense. Westlake pointed out that Russia entered the system of European international law as a result of its increased strength and civilization, and so did Japan. Abyssinia arguably became part of European international law after it defeated the Italians in the battle of Adowa, which caused the replacement of the 1889 Treaty purporting to establish an Italian protectorate over Ethiopia.<sup>104</sup> Therefore, membership in European international law or 'public law of Europe' was not based on any coherent principles. This effectively contradicts the exclusivity of the European law of nations as a legal system of those 'civilized' nations able to understand it. Any state that could force itself in could participate in 'public law of Europe'. The admission of nations into that system on the basis of their power effectively vulgarized its conceptual background, or perhaps even proved that there was no such system in the first place.

The practical implications of membership in 'public law of Europe' were no clearer than the conditions for such membership. Proponents of European international law consistently emphasized the importance of Article 7 of the 1856 Paris Treaty, which formally and solemnly admitted Turkey to the advantages of the public law of Europe, even though, as Nussbaum affirms, Turkey had quite extensive treaty relations with European nations before this 'admission' and the significance of this 'admission' is uncertain.<sup>105</sup> Even if formally part of the European family of nations, Turkey was still considered so culturally inferior that Europeans in Turkey had to be protected by their national consular jurisdictions. Turkey had practically no real influence on the politics of European concert. Even if the 1856 Treaty admitted Turkey to the 'advantages' of the European system, no visible advantages ensued. Turkey, at times considered a useful ally or partner of European powers such as Britain and Germany, was never regarded as a truly European power and the division of its territorial possessions among European powers was part of the European political agenda, as demonstrated by the 1916 Sykes–Picot agreement and, following the First World War, the allocation of Turkish territorial possessions to European powers under the League of Nations mandates system. It therefore seems that European powers did not really mean 'public law of Europe' as a legal system under which the rights and status of a state was increasingly protected but merely as some expression of political sentiment or, to express it in more fashionable terms, a 19th-century form of kitsch carrying with it no clearly defined rights and obligations.

Therefore, 'public law of Europe' did not in practice refer to law, but merely to ambiguous political traditions. One cannot fail to agree with Guggenheim that *jus publicum europeum* is a fiction or at most an ideological motivation of several norms of general international law. The norms developed as part of universal international

<sup>104</sup> Alexandrowicz, *supra* note 9, at 194–195; Alexandrowicz, *supra* note 10, at 22, 109.

<sup>105</sup> Nussbaum, *supra* note 2, at 191.

law, such as norms of recognition, integrity of state territory, neutrality, have not undergone substantial changes in the European context. The organizational structure of European concert had only episodic and temporary importance for the development of international law and did not result in the emergence of *jus publicum europeum*.<sup>106</sup>

Guggenheim's points effectively negate Grewe's argument, which is one-sided and inaccurate. It should be noted that Grewe does not confront the real issues as to the emergence and character of European international law, including the requirement of empirical evidence. This is even more pertinent as such argument is made in a way as to be further dependent on empirical evidence.

### D *The Balance of Powers in Europe*

The idea of the balance of power, which emerged in the 16th century, has long been a very important pattern of European politics,<sup>107</sup> and attracted the attention of international lawyers. Gentili considered that if some nations purported world domination, it was legal for other nations to attack them. Prevention was better than late remedies. Grotius did not approve the idea of fighting wars for this purpose and preferred peaceful precautions.<sup>108</sup> According to Puffendorf, the strength and power of a neighbour is not a just cause of war, 'unless it is established with moral and evident certitude that there is an intent to injure us'.<sup>109</sup> Wolff stated at once that 'the preservation of equilibrium among nations is not a just cause of war', but added that armed force can be resorted to against a power which manifestly considers plans to subject other nations to its power through a distortion of the equilibrium.<sup>110</sup> Vattel stated in general terms that taking up arms without an injury and threat is an unjust war.<sup>111</sup> It seems that there was no consistent agreement on this. But Grewe still argues that once the balance of power was part of the public law of Europe, interventions to uphold and restore that balance were legal.<sup>112</sup> This, again, is too imprecise: in those times there was no positive prohibition of the use of force.

The 1713 Utrecht Treaty referred to the concept of a just balance of powers and Grewe contends that this concept thereby became part of positive international law and the foundational principle of the public law of Europe.<sup>113</sup> But, apart from categorical and conceptual problems with this view, this was not the prevalent view at the relevant times. Heffter characterized a European balance of powers as an incidental safeguard of international law (*zufällige Garantie des Völkerrechts*). The essence of such

<sup>106</sup> Guggenheim, *supra* note 91, at 3–5.

<sup>107</sup> See generally Vagts and Vagts, 'The Balance of Powers in International Law: A History of An Idea', 73 *AJIL* (1979) 555; Ziegler, *supra* note 70, at 146, 177; Temperley, *supra* note 103, at 465–467; M. Walzer, *Just and Unjust Wars* (1977), at 76–80.

<sup>108</sup> For an overview see Nys, *supra* note 2, at 171–172, and Vagts and Vagts, *supra* note 107, at 559–562.

<sup>109</sup> Puffendorf, 'The Law of Nature and Nations', in Scott, *supra* note 5, Bk. 8, Chap. 6, at 1296.

<sup>110</sup> Wolff, *supra* note 5, at paras 646, 651, at 332, 335.

<sup>111</sup> Vattel, *supra* note 6, at 244.

<sup>112</sup> Grewe, *supra* note 8, at 397.

<sup>113</sup> *Ibid.*, at 328, 393.

balance of powers is that where one state decides to violate international law in relation to others, it must expect an adequate response from the victim, or also from others.<sup>114</sup> Even where international law is rooted in the conscience of nations, history shows countless incidences of threats and violations. Balance of powers can significantly prevent this.<sup>115</sup> As for the nature of this system, Heffter pointed out that European treaty practice served as an element of political calculation to prevent the possibility of concentration of power which would endanger the balance of powers. It was based not on strict law but on a certain moderation in state affairs. This was a *status quo* which was always sought, a colourless diplomacy (*farblose blasse Diplomatie*).<sup>116</sup> Bulmerincq also described the balance of powers as a principle of international practice, a political idea. States always invoked and rejected it on a political basis.<sup>117</sup>

In any case, the concept of a balance of powers cannot make a legal principle: it does not refer to the allocation of rights and duties, but merely of the anticipation to certain political and military outcomes and responses to them, whether preventive or restorative. This principle did not impose a legal duty on states to act in preservation of the balance of powers; nor did it confer specific rights to intervene, as the very use of force was not yet outlawed.

## E Evaluation

The idea of European exclusivity has remained a doctrinal aspiration. Practical experience confirms, in line with the views of the classic writers on universality, that international law has not emerged in Europe, nor has it ever acquired a specifically European character. It has always been a requirement of human interaction. Political communities, whatever their cultural and racial difference from other nations, felt the need for international law, for the increased certainty and predictability that it brings to inter-state relations. States need to protect and foster their interests; they accordingly need adequate cooperation with and from other states and they need to ensure a predictable framework for this purpose through the exchange of reciprocal rights and duties which they can feel confident about and which can be invoked in the event of non-compliance. Consequently, European states had longstanding and full-fledged international legal relations with non-Europeans, effectively sharing with them one single system of international law. It is unfortunate that the socio-political sentiment that shaped the argument put forward by the proponents of European international law caused them to adopt a narrow-minded attitude of racial superiority at the cost of neglecting the basic conceptual and historical features of international law.

<sup>114</sup> Heffter, *supra* note 41, 3–4.

<sup>115</sup> Heffter (1848), *supra* note 42, at 7.

<sup>116</sup> Heffter, *supra* note 41, at 16–17; Heffter (1848), *supra* note 42, at 18.

<sup>117</sup> A. Bulmerincq, *Praxis, Theorie und Codification des Völkerrechts* (1874), at 40–44. Goebel, *supra* note 103, at 172, also denotes the balance of power as a purely political matter.

## 4 The Idea of European International Law and Modern European Projects

The idea of European international law has, as demonstrated above, been based on the premise of a commonality among European nations in terms of their cultural, religious and political heritage, their social values and moral perceptions. These factors were invoked as justifying or even requiring that the legal status and relations of European states be regulated by a special legal system on a European scale, taking into account their specificity and commonality.

The emphasis on commonality is also observable in certain European projects which emphasized the unity of European states in pursuance of certain values and interests, such as the European Convention on Human Rights and the Law of the European Union. These legal frameworks refer to the specifically European heritage of democracy and individual freedom to emphasize European unity and the desire to form legal relations in accordance with such unity. It is worth examining whether the idea of a European international law is embodied in or revived by these developments, considering the relationship between the declared goals and the status of the relevant instruments as international legal instruments.

### A *The European Convention on Human Rights*

Although at the time of its adoption the European Convention was perceived as a reflection of and safeguard for democratic traditions in Europe, it is not an instrument based on specifically European values. The aim of the Convention, as its preamble suggests, is to create a mechanism for the collective enforcement of certain rights enshrined in the 1948 Universal Declaration of Human Rights. This Declaration is a starting-point and guide for European human rights protection. The like-mindedness and common heritage of traditions is invoked only as a reason for the setting in place of enforcement machinery. The rights and freedoms are universal, supplemented by the European enforcement machinery.

The European Commission of Human Rights declared in *Austria v Italy* that, when bringing a case before the organs of the European Convention, a state acts in defence of the public order of Europe embodied in the Convention.<sup>118</sup> This European public order involves the state's entitlement to act without its direct interests being affected by a violation, which seems to follow from the fact that the Convention obligations possess an objective nature, i.e. they give rise not to bilateral and reciprocal legal relations between states, but bind states towards all other state parties, irrespective of their direct and individual interests. In *Ireland v UK*, the European Court emphasized that

Unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of

<sup>118</sup> *Austria v Italy* (1961) 4 YB ECHR 140.

mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'.<sup>119</sup>

These obligations of a special type are assumed by each state party to benefit persons within its jurisdiction, and not other state parties.<sup>120</sup> While these circumstances mean that the Convention embodies the public order of Europe, they are not specifically European because certain treaties that operate outside or beyond Europe also possess similar characteristics. In its Advisory Opinion on *Reservations*, the International Court of Justice highlighted the similar character of the 1948 Genocide Convention. The Court stressed that:

In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.<sup>121</sup>

The UN Human Rights Committee spoke in identical terms about the 1966 International Covenant on Civil and Political Rights,<sup>122</sup> as did the Inter-American Court about the 1969 American Convention on Human Rights<sup>123</sup> and the International Criminal Tribunal for the Former Yugoslavia about the 1949 Geneva Conventions.<sup>124</sup> It is the humanitarian character of obligations, not the European scope, that endows the European Convention with its public order character.

In practice, the relevance of the specifically European character of the European Convention arose in relation to the reservations to this Convention. In *Chrysostomos and Loizidou*, the European Commission and the European Court of Human Rights had to resolve the legal consequences of the territorial application reservation to the instruments recognizing compulsory jurisdiction of these organs. The respondent state vigorously pleaded in both cases that its reservation expressed its intention, and was moreover an essential condition of its acceptance of jurisdiction. But the Commission and the Court nevertheless gave precedence to the requirements of their constituent instrument – the Convention – and severed reservations without prejudice to its overall acceptance.

This approach has found application at universal level, having been explicitly accepted by the UN Human Rights Committee in its General Comment 24(52) as a matter of general policy,<sup>125</sup> and in the case of *Rawle Kennedy*, as a specific expression of that policy.<sup>126</sup> In contrast, it has been contended that the European Court's approach follows from the specific European character of the European Convention.

<sup>119</sup> *Ireland v. UK*, 58 ILR 188, at 291.

<sup>120</sup> *Cyprus v. Turkey*, App. No. 8007/77, 13 DR 145, at 147; P. Van Dijk and G.J.H. Van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), at 40–41.

<sup>121</sup> [1951] ICJ Rep 23.

<sup>122</sup> General Comment 24(52) 2 IHRR (1995) 10, at para. 17.

<sup>123</sup> *Effect of Reservations*, 67 ILR 568, at para. 27.

<sup>124</sup> *Kuprsekic*, Judgment of 14 Jan. 2000, at para. 518.

<sup>125</sup> General Comment 24(52), *supra* note 122.

<sup>126</sup> *Rawle Kennedy v. Trinidad and Tobago*, Communication No 845/1999, CCPR/C/67/D/845/1999.

The objection to the severability view is that while it is legitimately applied at the European level, it is unsuitable at the universal level, as the latter is not based on the same degree of solidarity as the former.<sup>127</sup> This approach suggests that individuals in Europe are provided with a higher degree of protection than individuals elsewhere.

However, the European Court's attitude has not supported this approach. In *Loizidou*, the Court referred to certain differences between the reservations regime applicable to its own jurisdiction and to the jurisdiction of the International Court of Justice under Article 36 of its Statute. But, if one carefully analyses *Loizidou*, the difference between the two tribunals relates exclusively to the question of *which reservations are allowed under the respective optional clause and which are not*, and not *what the powers of a tribunal are in deciding on the consequences of those reservations*. The European Court referred to 'fundamental difference in the *role and purpose* of the respective tribunals',<sup>128</sup> and not to a difference in provisions governing their jurisdiction. This difference in role and purpose consists in that the subject-matter of disputes before the International Court may relate to any area of international law and 'the role of the International Court is not exclusively limited to direct supervisory functions in respect of a law-making treaty such as the [European] Convention'.<sup>129</sup> Consequently, *Loizidou* affirms that certain reservations, which would be permissible to the jurisdiction of the International Court, are impermissible to the jurisdiction of the European Court; but it does not suggest that other tribunals would not have the power to sever a reservation that is incompatible with their own constituent instruments.

Moreover, the European Court adopted its severability view on the basis of general international law embodied in the 1969 Vienna Convention on the Law of Treaties. The VCLT assists tribunals in this process. This holds true for the UN Human Rights Committee,<sup>130</sup> the European Commission<sup>131</sup> and the European Court of Human Rights.<sup>132</sup> On the issue of whether incompatible reservations are severable, the European Court has never referred to the special European character of the European Convention.<sup>133</sup> It has done nothing that cannot be done outside the European framework and has not upheld the idea of European exclusivity.

<sup>127</sup> The ILC has considered that if incompatible reservations are void they invalidate the entire acceptance, but this principle is 'without prejudice to the practices and rules developed by monitoring bodies within regional contexts': [1997] II *YbILC*, Part Two, at 44. See also the Commission's discussion: [1997] I *YbILC* 177.

<sup>128</sup> *Loizidou*, Preliminary Objections, ECHR Series A-310 (1995)b 20 EHRR 99, at para. 85 (emphasis added).

<sup>129</sup> *Ibid.*, at para. 84.

<sup>130</sup> *Rawle Kennedy*, *supra* note 26, at paras 6.5ff, and more generally, General Comment No. 24(52), *supra* note 122, at para. 6.

<sup>131</sup> *Temeltasch* (1983) 5 EHRR 417, at 423ff, at paras 32ff., 431ff., 68ff.; *Chrysostomos* (1991) 12 HRLJ 119, at 120–121, at paras 12, 23.

<sup>132</sup> *Belilos*, Series A, 132, at 21ff. para. 42; *Loizidou*, *supra* note 129, at 27, paras 72ff.; Van Dijk and Van Hoof, *supra* note 122, at 776, emphasize that the outcome of severability in *Loizidou* was dictated by the need for compatibility with the object and purpose under Art. 19 VCLT(1969), 1155 UNTS 331.

<sup>133</sup> The Court inferred *its own power to sever reservations* from the two other circumstances: the interplay between the respondent's intention and the jurisdictional requirements contained in Arts 25 and 46 of the European Convention on Human Rights (at para. 95) and the fact that the examination of the respondent's declaration allowed the separation of impugned clauses from the remainder of acceptance (at para. 97); *supra* note 129, at 31–32.

## B The Law of the European Union

It is interesting to see how the law of the European Union (or its predecessors) was understood in its early days. In the early 1950s Guggenheim, having concluded that the 'public law of Europe' had been a fiction, explored the possibilities of establishing a European public law in the framework of the European Coal and Steel Community established in 1952 and the then contemplated European Economic Community. Guggenheim's starting-point is that these European institutions differ from ordinary international organizations because of their extensive powers, although he accepts that this difference is not legally based.<sup>134</sup> In Guggenheim's view, supranational European institutions open the door for the development of *jus publicum europeum* which exists alongside national and international legal systems – an autonomous system of new European law.<sup>135</sup>

This thesis must be tested against the experience accumulated in the last half of the 20th century. Hartley considers that once Community law becomes a separate legal system, customary international law is totally excluded *inter se* in the area covered by the Community treaties. The gaps in the law are filled by new rules established by the European Court of Justice.<sup>136</sup> This emphasis on such an *inter se* aspect in principle excludes the claim of exclusivity. But the complete irrelevance of general international law cannot be claimed either.

The validity of the Community legal system is derived from and depends on international law, which effectively disapproves attempts to perceive the EU as based on certain doctrines of constitutionalization or on a *Grundnorm* independent of international law.<sup>137</sup> This holds true for supranational powers of the Commission and the Council. It is true that there is a substantive difference between the European Union and other international organizations as the former possesses specific aims of European integration and extensive powers to bind Member States and their nationals to that end. However, there are no consistent criteria for constructing a workable juridical distinction between supranational organizations and international organizations,<sup>138</sup> especially in relation to general international law. Being a supranational organization means also being an international organization.

Guggenheim's aspiration was arguably reflected in the jurisprudence of the European Court of Justice. In *Van Gend en Loos*, the European Court of Justice (ECJ) stated that the EEC Treaty is 'more than an agreement which merely creates mutual obligations between the contracting States'. It establishes institutions to enforce the Treaty and to effect the rights of Member States and their citizens. Therefore, 'the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of

<sup>134</sup> Guggenheim, *supra* note 91, at 10–11.

<sup>135</sup> *Ibid.*, at 13.

<sup>136</sup> T.C. Hartley, *European Union Law in a Global Context* (2004), at 135.

<sup>137</sup> *Ibid.*, at 133; Hartley, 'International Law and the Law of the European Union—A Reassessment' [2003] *BYIL* 3.

<sup>138</sup> Hartley, *supra* note 136, at 1–2.

which comprise not only Member States but also their nationals'.<sup>139</sup> In *Costa v ENEL*, the Court followed the same line by affirming that, '[b]y contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the EEC Treaty, became an integral part of the legal systems of the Member States'. Furthermore,

by creating a community of unlimited duration, having its own institutions, its own personality, its own capacity and the capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.<sup>140</sup>

Whatever the Court's need to adopt this line of reasoning to decide on pertinent issues of Community law, it effectively pronounced on the position of the Community, and *a fortiori* of the European Union, in international law.

The Court's assertion that the EEC Treaty is more than an ordinary international treaty which creates mutual obligations between states is clearly explicable under international law, which has long accepted that different treaties can possess different characters and that not all treaties create bilateral obligations. During the codification of the law of treaties in the UN International Law Commission (ILC), Special Rapporteur Fitzmaurice categorized international treaties and singled out those that are not ordinary bilateral transactions. These are interdependent treaties, such as those concerning disarmament, demilitarization and territorial arrangements, which can only subsist if all parties comply with them, and integral treaties, which not only will subsist despite non-compliance by some parties, but will even bind state parties, both the violators and others, regardless of such non-compliance.<sup>141</sup> This last category includes humanitarian treaties whose characteristics have been expounded, as examined earlier, by human rights tribunals. Such categorization of treaties is recognized by the 1969 Vienna Convention on the Law of Treaties with regard to the modification, suspension and termination of treaties (Articles 41, 58 and 60) with implications for the relevant rights and duties of state parties to treaties. Similar categories have been adopted by the ILC in its Articles on State Responsibility.<sup>142</sup> Therefore, the fact that the EEC Treaty differs from ordinary international agreements is no warrant for presuming that the law it establishes is not part of, and governed by, international law.

The Court's reference to the fact of establishing an organization with unlimited duration, legal personality and representation powers is nothing but a reference to the characteristics of most traditional international organizations. This is also confirmed by the Court's emphasis on the limited nature of the Community's competence, in line with the limited and delegated nature of the powers of international

<sup>139</sup> Case 26/62, [1963] ECR 12.

<sup>140</sup> Case 6/64, [1964] ECR 585.

<sup>141</sup> *Second Report* [1957] II YbILC 54; *Third Report* [1958] II YbILC 44.

<sup>142</sup> Commentary to Art. 42 [2001] *ILC Rep* 297, at paras 6–14.

organizations. Reference to the extensive character of the Community's substantive powers and their penetration into the Member States' legal systems is the most characteristic emphasis on the Community's specific nature. Yet, there is little in this reasoning that is not explainable by reference to 'normal' international law, under which states can, subject to the limit of peremptory norms, enter into any kind of agreement they wish and establish an international organization with as extensive powers as they desire, whether or not there are implications for their own legal systems. This process is an incidence of state sovereignty under international law. As the Permanent Court of International Justice affirmed in *Wimbledon*, its first decision in a contentious case, entering into an international agreement is not just a limitation on, but also the very realization of, state sovereignty.<sup>143</sup> Therefore, the system of European Union law is there because it is based on treaties which are sources of international law, and further specified and developed by institutions which are organs of an international organization whose every feature is due to international law factors.

It seems therefore that the ECJ has never intended to view European institutions as being isolated from international law; its reference in *Costa v ENEL* to its 'own legal system' must be understood as a reference to a system based on and explained by international law. This position is further confirmed by the reference in *Van Gend en Loos* to a 'new legal order of international law'.<sup>144</sup>

The ECJ has developed the Community legal order, having introduced into it a number of doctrines such as that of direct effect and supremacy of Community law, which justifies treating this legal order as an entity that is not fixed in time and space, but rather as a developing process that includes quite original legal relations in terms of traditional international law.<sup>145</sup> At the same time, this assertion of powers of the Community institutions is still subject to normal processes of international law regarding the competence of international organizations. This has been affirmed by the German Constitutional Court in *Brunner v EU Treaty* (German Maastricht case) and the Danish Supreme Court in *Carlsen v Rasmussen* (Danish Maastricht case).<sup>146</sup> Both courts emphasized that the powers of the Community are limited, as are the powers of every international organization, that the Community is not empowered to extend its competence, and that no decision that exceeds the powers of the Community will bind Member States. All this is a restatement of the traditional doctrine of *ultra vires* applicable to the excess of powers by international organizations, and the Community's actions must be viewed in this framework. At the same time, the European Court's development of doctrines that affect the legal systems of Member States can be

<sup>143</sup> *Wimbledon*, PCIJ Series A, No.1, 15.

<sup>144</sup> It seems that *Van Gend en Loos* was misinterpreted in the Opinion of Jacobs AG in Case C-316/93, *Vanetveld* [1994] ECR I-763, asserting a difference between the Community legal order and international law by reference to conferral under the former of the rights to individuals as against private bodies. The ECJ has never subscribed to this attitude.

<sup>145</sup> Bethlehem, 'International Law, European Community Law, National Law: Three Systems in Search of a Framework', in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (1998), at 169, 181-182.

<sup>146</sup> *Brunner*, Case No 2134 & 2159/92, 98 ILR 196, at 227-231; *Carlsen v. Rasmussen* [1999] 3 CMLR 854.

viewed either as incidences of the exercise of treaty-based powers, or they may be explained by reference to the attitudes of Member States,<sup>147</sup> in terms of traditional international law categories of acquiescence, estoppel and custom-generation at the regional scale.

Given all of these factors, any understanding of 'European law' as a free-standing legal system is a fiction; international law always plays an important role in the operation and development of this law. In interpretative terms, the ECJ construed the general principles of the Community legal order as based on international human rights treaties,<sup>148</sup> especially universal instruments such as the ICCPR and the ILO Convention No. 111 concerning discrimination in respect of employment.<sup>149</sup> From outside the Community legal order, the same principle has been affirmed with regard to the European Convention on Human Rights.<sup>150</sup> That the European institutions operate within the field of international law is also affirmed by the fact that they are bound by customary international law in the same way as any legal entity is.<sup>151</sup> This is the case not only where the attitude asserted by the Community organs contributes to the creation of customary law (such as in terms of estoppel),<sup>152</sup> but also generally in terms of the action of the Community in the fields regulated by general customary law.

In *Racke v Hauptzollamt Mainz*,<sup>153</sup> the ECJ applied the doctrine of *rebus sic stantibus* to the agreement between the EC and Yugoslavia, following the latter's disintegration. The Court could not apply the 1969 Vienna Convention because the EC was not party to it. Nevertheless, several of its provisions, including Article 62, embodied customary law. The Court affirmed that treaties concluded by the Community were part of Community law and remained so until ended in accordance with international law. The Court in principle could invalidate a Community measure if found to be in conflict with customary international law. The relevant norms of customary law formed 'part of the Community legal order'. The requirement of fundamental change of circumstances were, according to the Court, met by the Community, but the procedural requirements for treaty termination provided for in the Vienna Convention were not part of customary law and hence did not bind it.<sup>154</sup>

This confirms that European institutions are bound by general international law as any other actor is. EU law is part of international law and its operation is subject to compliance with international law. The EU can exercise the extensive powers delegated to it by Member States but every such exercise is subject to compliance with the

<sup>147</sup> On this see T.C. Hartley, *The Foundations of European Community Law* (1998), at 233–257.

<sup>148</sup> Case 4/73, *Nold* [1974] ECR 491, at para. 13.

<sup>149</sup> For the overview and analysis see Bethlehem, *supra* note 145, at 190–191.

<sup>150</sup> *M & Co v. FRG*, App. No. 13258/87, 33 YB ECHR (1990), at 51–52; *Matthews v. UK*, App. No. 24833/94, (1999) 28 EHRR 361, at paras 26–35. For an analysis see Hartley, *supra* note 137, at 26–35.

<sup>151</sup> Lowe, 'Can the European Community Bind the Member States on Questions of Customary International Law?', in Koskeniemi, *supra* note 145, at 149.

<sup>152</sup> *Ibid.*, at 160–161.

<sup>153</sup> Case C-161/96, [1998] ECR I-3655.

<sup>154</sup> *Ibid.*, at paras 24, 42, 46–58.

relevant international legal norms. In relation to international law, EU law forms a complex system of *lex specialis* – a quite explainable phenomenon in terms of traditional principles and categories of international law.

Practical developments have affirmed Guggenheim's prophecy that the European Community would operate within the limits set by the rights of nation-states whose competences are limited but by no means abolished, as well as by universal international law.<sup>155</sup> But this very thesis contradicts the assumption that this system would give rise to *jus publicum europeum*. As it is not exclusive in relation to the rest of international law, the law of the European Union does not give rise to any system of European international law.

## 5 Conclusion

The idea of European international law as developed by its proponents has from the outset been a racist idea that misrepresented the real character of international law. As is clear, universal international law is possible both from naturalist and positivist perspectives. International law has always been universal both because its natural law element inherently implies universality as upheld by classical writers, and also because state practice as an aspect of positive law has consistently supported its universality.

Consequently, European international law is an ideology based not on evidence, but on prejudice and chauvinism generated from a sense of racial, cultural and religious superiority over those who are different. It thus translated into the concept of legal exclusivity, which was never realized in practice. Indeed, the concept never became reality because of the conceptual and practical impossibility of legal exclusivity in the international legal system.

There is thus no need to revive the idea of exclusivity reflected in 'European international law' within the framework of modern European projects. There appears to be an increasing awareness today that regional projects like these are derived from, and operate in accordance with, general international law. Accumulated experience proves that international legal reasoning should be rid of the clichés of European international law and the related implications of the continuous tradition of Eurokitsch based on the misinterpretation of legal institutions right up to the end of the 20th century. This will help us to properly confront and better understand the legal principles and institutions in our already complex world of international law.

<sup>155</sup> Guggenheim, *supra* note 91, at 14.