II. HISTORY OF INTERNATIONAL LAW

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Sources: Treaty between the Hittites and Egypt (1270 BC), Canons of Second Lateran Council (1139), The Treaty of Osnabrück (1648), Treaty of Paris (1856), Convention regarding the Abolition of the Capitulations in Egypt (1937)

Introduction

Origins of international law span up to the ancient era. As early as there were first contacts between the first states, we can study relations between them. And we may identify that they had also legal aspects – first legal customs were formed, first treaties were concluded, they entered into alliances, or disputes were settled in a peaceful way. In this sense, we can observe that international law indeed has its origins in the ancient era. However, we must have in mind that its characteristics were dramatically different from those it has today.

We may speak of several differences. Aside from it being rudimentary in its content in comparison to current international law, it had only **regional character**. We cannot speak of universal international law in the sense of a system of rules and principles that would be applicable around the globe.

In the ancient era existed several regional centres within which the relations were of greater intensity. On the other hand, the relations with the states outside of a regional centre were weak if even any. In other words, the relations e.g. between particular Greek states (*polis*) were of great intensity. Their contacts outside of a Greek regional centre existed but were limited. Of course, the contact with Egypt was more intensive than with China. And the relations with the American regional centre were absent totally.

In the ancient era or **archaic period of international law,** we can therefore speak of the existence of several regional legal systems rather than of a single universal international system. The most important regional systems were Mesopotamia, Egypt, and Greek city-states, which were eventually incorporated into one interconnected **Mediterranean regional system** in which Rome eventually

gain dominance, and thus its views on how the relations should look were the most influential. Greeks and Romans in their relations differentiated between civilised and barbarian nations.

Aside from the Mediterranean regional system, probably the other most significant regional system was the **regional system of the Far East** with the dominance of Chinese kingdoms. This is because when we are speaking of China in the ancient era, we are not speaking of a single unified state, but about several Chinese kingdoms that were only later unified into one empire. These hence developed relations between each other, as well as with outsiders which were, similarly to the previous system, not considered as equals.

In the books of public international law, the focus is put on the Mediterranean or European regional system even though in several ways other regions could be equally or even more developed. This is not necessarily caused by arbitrary eurocentrism that we should overcome. **The universal international system is based on European tradition**. Other regional systems were not that expansive and despite their internal development, Europeans were the ones that (peacefully or forcibly) „exported“ their worldview on how international relations should look like. Therefore, what shaped Europe will eventually, through their influence, shape the world. There is no exact date when international law became universal in nature, some argue that it was from the 19th century, when European powers completely spread around the globe and thus interconnected it. Certainly, we can say that it entered the 20th century with such a nature.

The second distinctive characteristic of archaic international law was the fact that it was generally regulating relations **between dynasties not between states**. In the ancient and medieval eras, the monarch personally was sovereign, not the state in an abstract sense as we understand it today. The state was understood as a *patrimonium* of a ruler. We can speak about the modern concept of a nation-state only from the 18th – 19th century.

From this period of history, we have knowledge of international institutes like **treaties**. The first documented international treaty was a peace treaty concluded between the Mesopotamian cities of Umma and Lagash (c. 3100/2700-2500 BC, the exact date is disputed). This treaty was concluded as a result of **mediation** done by the king of the city of Ur. This treaty did not last long. Probably the oldest treaty that is still in force is the Treaty of peace, friendship and confederation between John I of Portugal and Richard II, king of England (1386 AD).

This era also knew **diplomacy** which was originally conducted in an *ad hoc* way. That means an envoy was sent to a court of another ruler with a special mission after fulfilment of which he returned. In Greece, an envoy presented himself with a diploma, which is a Greek word for the folded object (*diplo*, folded

in two and, *ma*, object), that was the document which granted privileges to the bearer. The envoy was understood as *alter ego* of the sender; therefore, he was entitled to the same privileges and immunities as if he was the other sovereign. Permanent diplomacy emerged only in the 15th century in northern Italy.

Some of the ancient Greeks acted also as *proxens,* which were persons with functions similar to **consuls**. However, the current consular law has roots rather in the consuls which helped to protect the interests of merchants in northern Africa in the late medieval era.

The ancient era also brought forth the first notions of ***ius ad bellum*** (right to war), which is a set of rules and principles which regulated when a war can be rightfully waged. The most developed was the roman concept of just war (*iustum bellum*). That means the Romans considered several causes of war after fulfilment of which they were allowed to declare war against other nations. We may mention four: a) attack against roman dominion, b) attack against roman envoy, c) violation of a treaty, and d) aid provided to the enemy of Rome. The war itself, which means how the war should be rightfully waged, however, was not regulated and was therefore conducted often in a very brutal way.

This other set of rules, known as ***ius in bello*** (right in war), taking aside some ancient philosophical thoughts, originated in the medieval era. Its roots are in the attempts of the Church to alleviate the suffering as well as in the emergence of chivalry ethics. An example is the trial of Peter von Hagenbach (1474) who was beheaded for atrocities that „he as a knight was deemed to have a duty to prevent“. The Catholic Church also tried to codify some rules which were to be applied between Christian nations. Church councils were often connected also with discussions about secular matters. The Catholic Church prohibited e. g. to wage a war during certain days, namely during church feasts or imposed a duty to protect some persons like clergy, asylees, or civilians in general. Despite her authority, these regulations were not always duly observed. The current system of *ius in bello*, called international humanitarian law, is however connected rather with the movement of Henry Dunant and the Movement of the Red Cross in the second half of the 19th century. Aside from mentioned attempts to regulate relations, the Catholic Church used its authority also in settlements of disputes between European monarchs. Christian scholars also revised the doctrine of just war, which was not impermissible as such. According to Thomas Aquinas, three requirements must be met: First, the war must be waged upon the command of a rightful sovereign. Second, the war needs to be waged for just cause, on account of some wrong they attacked have committed. Thirdly, warriors must have the right intent, namely, to promote good and avoid evil. Other catholic scholars developed also naturalistic concepts like Francisco de Vitoria who argued at the

Spanish royal court against cruelty towards Native Americans on the basis that they, as humans, have the right to dignity and other rights following from that very fact. The European medieval era was characterized by the dominance of the pope and the Holy Roman Emperor. This system of relations is sometimes called also *Respublica Christiana*. **International law was understood as a part of canon law**, which was supranational in nature. It was binding on all (catholic) rulers.

This paradigm was ended with the congress of Westphalia (1648). We may say that it was the first **international congress** at which the rulers, through their agreements, formed new international order. One of the main principles was the principle of sovereign equality, which fundamentally shapes the **international community** of states. All states (kingdom and duchy alike) gained their rights to conduct their internal (e. g. *cuius regio, eius religio*) and external affairs (*ius tractandi*) independently. Even though to be fair we should rather say that this was a significant step towards a full development of this legal principle. It was however applied only to so-called **civilised nations**. These were only European states, and those that were **recognized** by them as such (like the USA shortly after gaining independence or the Ottoman Empire in the second half of the 19th century). Non-civilised nations were not understood as subjects of international law, European states concluded with them only unequal treaties (e. g. Treaty of Nanking, 1842 or various capitulation treaties) or their territory was considered as *terra nullius*, thus eligible for an occupation that was in full conformity with the colonial policies of European powers. **Permanent diplomacy** (diplomacy conducted through embassies), which originated in the second half of the 15th century in Italy, became a common way how diplomatic relations were conducted and gradually spread also outside of Europe.

Doctrinally important were the works of **Hugo Grotius** (Duch protestant, serving at Swedish diplomatic services in France) who redefined Roman legal concept of *ius gentium* to a law between states. In Grotius's works, *ius gentium* has come to be a branch of public law governing the relations between one people and another. Due to this doctrinal line, we are speaking about international law (law between nations*, ius inter gentes* or law of nations, *ius gentium*) and not about interstate law, even though the second is more appropriate designation for this legal system. He contributed to the development of the theory of treaties, distinguishing them from contracts, to the theory of international customs, to the theory of just war and important are also his works on the freedom of the seas (notable works are *De Jure Belli ac Pacis* and *Mare Liberum*). Public international law in his opinion was not part of the natural law, nor of the canon law, but a separate set of rules and principles.

In the 19th century, several **alliances** were formed to provide stability and balance of power in Europe. The first important was the Holy Alliance formed after the **congress of Vienna**. It was a system of conservative states consisting eventually of Austria, England, Prussia, Russia, and France. This system, called the European concert of great powers, was disrupted by the Crimean war in 1853 – 1856. After the war, the Treaty of Paris (1856) was concluded and mutual security was later ensured by a system of alliances known as the Triple Alliance and the Triple Entente. This system failed to provide long-lasting peace and security as was shown by the eruption of the Great War.

This period introduced into usage multilateral treaties that were open for later accession by other states. Multilateral treaties were known also before the 19th century but were used for a settlement of a particular issue or conflict. Their open character would be of no use. These open multilateral treaties were used as a way how to formulate general legal rules to be followed in the future. Examples were **founding treaties** of the first **international organisations**, which had firstly only administrative character (they were administrative unions like the International Telegraph Convention which founded the International Telegraph Union in 1865 or Treaty of the Metre, which founded the International Bureau of Weights and Measures, 1875), or treaties like first Geneva Convention (1864) or Hague Peace Conventions concluded at Hague Peace Conferences in 1899 and 1907. Thanks to this initiative the first permanent body of international justice, **the Permanent Court of Arbitration**, was formed in 1899. Disputes up to this time were settled with diplomatic means or via ad hoc arbitration. These conferences were important for the foundation of the Hague Law which was aimed at the prohibition of some methods of warfare. Geneva Law on the other hand was focused rather on the protection of persons.

After the First World War, the **League of Nations** was formed in 1920. Even though some international organisations existed from the end of the 19th century, this was the first universal international organisation with political nature. It had also a judicial body – **the Permanent Court of International Justice**. The states were from this time able to choose if they want to settle their dispute in a non-binding diplomatic way or to resort to two distinctive binding methods: arbitration or judicial settlement with their own advantages. The system was able to solve some disputes of lower or medium intensity. The project of the League of Nations lived even shorter than the criticised alliance system. The main reasons are the absence of an effective institutional basis and means to achieve ambitious aims as well as the absence of important actors in international relations among its members.

The experience of humankind of another global war moved the **international community** to the foundation of **the United Nations** in 1945. From this moment we may speak of **contemporary public international law** as we know it today. We may highlight four distinctive features which the new international legal system brought:

a) emergence of **ius cogens rules and principles** one of which is the **principle of non-use of the threat of force against another state**. The primary responsibility for the maintenance of international peace and security was conferred to **the UN Security Council** which consists of 15 members, 5 of whom are permanent with the right of veto. It is not a coincidence that permanent members are the major winning states of the Second World War;
b) promotion of the individual to the level of international personality. The individual is subject to **international human rights law** as well as **international criminal law** which are two new important branches of contemporary public international law;
c) **treaty** became the preferred source of law. Many branches of public international law that were earlier customary were codified in treaties or new areas were progressively developed through treaties. The Secretary-General of the United Nations is the depositary of more than 560 multilateral treaties and registered bilateral treaties are numbered in tens of thousands. This is namely because international treaties provide better clarity in regulation. Important in a **codification** of international law are activities of the **International Law Commission**;
d) **international organisation** became a widely used institutional basis for co-operation of states. States confer them legal personality and after their foundation they are acting independently. They are either universal or regional. The most important from them is the United Nations. Currently, the number of international organisations is counted in the hundreds, however not all international organisations possess international personality, which has to be evaluated individually. Non-governmental organisations still do not acquire international personality, and if, they are treated as individuals.

Documents

1. Treaty between the Hittites and Egypt (1270 BC)

... Now from the beginning of the limits of eternity, as for the situation of the great ruler of Egypt with the Great Prince of Hatti, the god did not permit

hostility to occur between them, through a regulation. But in the time of Muwatallis, the Great Prince of Hatti, my brother, he fought with Ramses Meri-Amon, the great ruler of Egypt. But hereafter, from this day, behold Hattusilis, the Great Prince of Hatti, is under a regulation for making permanent the situation which the Re and Seth made for the land of Egypt with the land of Hatti, in order not to permit hostility to occur between them forever.

Behold, Hattusilis, the Great Prince of Hatti, has set himself in a regulation with User-maat-Re Setep-en-Re, the great ruler of Egypt, beginning from this day, to cause that good peace and brotherhood occur between us forever, while he is in brotherhood with me and he is at peace with me, and I am in brotherhood with him and I am at peace with him forever... The land of Egypt, with the land of Hatti, shall be at peace and in brotherhood like unto us forever. Hostilities shall not occur between them forever.

The Great Prince of Hatti shall not trespass against the land of Egypt forever, to take anything from it. And User-maat-Re Setep-en-Re, the great ruler of Egypt, shall not trespass against the land of Hatti, to take from it forever.

If another enemy come against the lands of User-maat-Re, the great ruler of Egypt, and he send to the Great Prince of Hatti, saying: „Come with me as reinforcement against him“, the Great Prince of Hatti shall come to him and the Great Prince of Hatti shall slay his enemy. However, if it is not the desire of the Great Prince of Hatti to go (himself), he shall send his infantry and his chariotry, and he shall slay his enemy. Or, if Ramses Meri-Amon the great ruler of Egypt, is enraged Against servants belonging to him, and they commit another offence against him, and he go to slay them, the Great Prince of Hatti shall act with him to slay everyone against whom they shall be enraged.

If a great man flee from the land of Egypt and come to the Great Prince of Hatti, or a town belonging to the lands of Ramses Meri-Amon, the great ruler of Egypt, and they come to the Great Prince of Hatti, the Great Prince of Hatti shall not receive them. The Great Prince of Hatti shall cause them to be brought to User-maat-Re Setep-en-Re, the great ruler of Egypt, their lord, because of it. Or if a man or two men – no matter who[14] – flee, and they come to the land of Hatti to be servants of someone else, they shall not be left in the land of Hatti; they shall be brought to Ramses Meri-Amon, the great ruler of Egypt.

As for these words of the regulation which the Great Prince of Hatti made with Ramses Meri-Amon, the great ruler of Egypt, in writing upon this tablet of silver-as for these words, a thousand gods of the male gods and of the female gods of them of the land of Hatti, together with a thousand gods of the male gods and of the female gods of them of the land of Egypt, are with me as witnesses hearing these words...

As for these words which are on this tablet of silver of the land of Hatti and of the land of Egypt – as for him who shall not keep them, a thousand gods of the land of Hatti, together with a thousand gods of the land of Egypt, shall destroy his house, his land, and his servants. But, as for him who shall keep these words which are this tablet of silver, whether they are Hatti or whether they are Egyptians, and they are not neglectful of them, a thousand gods of the land of Hatti, together with a thousand gods of the land of Egypt, shall cause that he be well, shall cause that he live, together with his houses and his (land) and his servants.

If a man flee from the land of Egypt – or two or three – and they come to the Great Prince of Hatti, the Great Prince of Hatti shall lay hold of them, and he shall cause that they be brought back to User-maat-Re Setep-en-Re, the great ruler of Egypt. But, as for the man who shall be brought to Ramses Meri-Amon, the great ruler off Egypt, do not cause that his crime be raised against him; do not cause that his house or his wives or his children be destroyed; do not cause that he be slain; do not cause that injury be done to his eyes, to his ears, to his mouth, or to his legs; do not let any crime be raised against him.

2. Canons of Second Lateran Council (1139 AD)

Can. 11., We also prescribe that priests, clerics, monks, pilgrims, merchants and peasants, in their coming and going and their work on the land, and the animals with which they plough and carry seeds to the fields, and their sheep, be left in peace at all times.

Can. 12., We decree that the truce is to be inviolably observed by all from sunset on Wednesday until sunrise on Monday, and from Advent until the octave of the Epiphany, and from Quinquagesima until the octave of Easter. If anyone tries to break the truce, and he does not comply after the third warning, let his bishop pronounce sentence of excommunication on him, and communicate his decision in writing to the neighbouring bishops…

Can. 15, In the same way we have decided to legislate that if anyone, at the instigation of the devil, incurs the guilt of the following sacrilege, that is, to lay violent hands on a cleric or a monk, he is to be subject to the bond of anathema; and let no bishop presume to absolve such a person unless he is in immediate danger of death, until he has been presented before the apostolic See and submits to its decision. We also prescribe that nobody dare to lay hands on those who flee to a church or cemetery. If anyone does this, let him be excommunicated.

Can. 29., We prohibit under anathema that murderous art of crossbowmen and archers, which is hateful to God, to be employed against Christians and Catholics from now on.

3. The Treaty of Osnabrück (1648)

Art. 5, para. 1, That the Transaction settled at Passau in the Year 1552. and followed in the Year 1555. with the Peace of Religion, according as it was confirmed in the Year 1566. at Augsburg, and afterwards in divers other Diets of the sacred Roman Empire, in all its Points and Articles agreed and concluded by the unanimous Consent of the Emperor and Electors, Princes and States of both Religions, shall be maintained in its Force and Vigour, and sacredly and inviolably observed… And as to all other things, That there be an exact and reciprocal Equality amongst all the Electors, Princes and States of both Religions, conformably to the State of the Commonweal, the Constitutions of the Empire, and the present Convention: so that what is just of one side shall be so of the other, all Violence and Force between the two Parties being for ever prohibited.

Art. 8, para. 2, That they [the Electors, Princes, and States of the Roman Empire] enjoy without contradiction the Right of Suffrage in all Deliberations touching the Affairs of the Empire, especially in the matter of interpreting Laws, resolving upon a War, imposing Taxes, ordering Levies and quartering of Soldiers, building for the public Use new Fortresses in the Lands of the States, and reinforcing old Garisons, making of Peace and Alliances, and treating of other such- like Affairs; so that none of those or the like things shall be done or received afterwards, without the Advice and Consent of a free Assembly of all the States of the Empire.

That, above all, each of the Estates of the Empire shall freely and for ever enjoy the Right of making Alliances among themselves, or with Foreigners, for the Preservation and Security of every one of them: provided nevertheless that these Alliances be neither against the Emperor nor the Empire, nor the public Peace, nor against this Transaction especially; and that they be made without prejudice in every respect to the Oath whereby every one of them is bound to the Emperor and the Empire.

4. Treaty of Paris (1856)

Art. 7, Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, His Majesty the Emperor of Austria, His Majesty the Emperor of the French, His Majesty the King of Prussia, His Majesty the Emperor of All the Russias, and His Majesty the King of Sardinia, declare the Sublime Porte admitted to participate in the advantages of the Public Law and System (Concert) of Europe. Their Majesties engage, each on his part, to respect the Independence and the Territorial Integrity of the Ottoman Empire; Guarantee in common the

strict observance of that engagement; and will, in consequence, consider any act tending to its violation as a question of general interest.

5. Convention regarding the Abolition of the Capitulations in Egypt (1937)

Art. 1, The High Contracting Parties declare that they agree, each in so far as he is concerned, to the complete abolition in all respects of Capitulations in Egypt.

Art. 2, Subject to the application of the principles of international law, foreigners shall be subject to Egyptian legislation in criminal, civil, commercial, administrative, fiscal and other matters...

Art. 13, Any dispute between the High Contracting Parties relating to the interpretation or application of the provisions of the present Convention, which they are unable to settle by diplomatic means, shall, on the application of one of the parties to the dispute, be submitted to the Permanent Court of International Justice...

Art. 15, The present Convention shall be ratified and the instruments of ratification shall be deposited as soon as possible at Cairo. The Royal Egyptian Government shall undertake the registration of the Convention with the Secretariat of the League of Nations.

The Royal Egyptian Government shall inform the Governments of the High Contracting Parties and the Secretary-General of the League of Nations of the deposit of each ratification.

The present Convention shall come into force on 15 October 1937 if three instruments of ratification have been deposited...

Questions and further reading

1. Who are parties of the 1270 BC treaty? What are some of their mutual obligations?
2. What rights and duties for imperial princes were formulated after the Westphalian peace?
3. What was the relation of the canon law and international law in medieval era? Give example.

Further reading:

1. CARTER, B. E., WEINER, A. S., HOLLIS, D. B. *International Law*. New York : Wolters Kluwer, 2018, 1202 p.

2. FASSBENDER, B., PETERS, A. (eds.) *The Oxford Handbook of the History of International Law*. Oxford : Oxford University Press, 2012, 1228 p.
3. WINER, A. S. *International Law Legal Research*. Durham : Carolina Academic Press, 2013, p. 21 – 52.