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## Foreword: Marshalling International Governance under the Rule of Law

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## Preface

### Marshalling International Governance under the Rule of Law

*Medieval Times ... are for the science of the law of nations exceedingly barren. During that whole period, which was altogether unfavourable to all sciences, there was hardly anything, with regard to this particular area of scholarship, which may deserve any mention.*

'Skip the Middle Ages'. Such was the message from Dietrich H.L. von Ompteda in his historical survey of international law, which he included in the introduction to his important bibliographical work on the 'Literature of the entire law of nations, both natural and positive', published in 1785. The Middle Ages which he referred to, he explained, spanned the whole period from 533 (Tribonian's work on Justinian's compilations) until 1625, when Grotius' *De jure belli ac pacis* was first published, a work "which projected a much clearer and completely new light on the law of nations". Accordingly, the reader is propelled straightaway from the early sixth century to a handful of (late-)sixteenth-century figures: J. Oldendorp, G. Vasquez, F. Suarez, A. Gentili, and B. Winkler. After a brief discussion of these authors, a new era, the proper beginnings of international law scholarship, starts with Grotius.

In spite of, or perhaps partly because of, his cultural biases, Ompteda remains an excellent source for our understanding of the intricate links in eighteenth-century scholarship between the complex concepts which had been built at the time around natural law and the law of nations. While legal historiography tends to highlight the sixteenth-century legal humanists' sometimes virulent attacks on late-Medieval legal scholarship, those same legal humanists proved time and again to rate highly those writers whom they acknowledged as the better jurists among the 'bartolists'. They certainly valued some of their arguments and doctrines. Indeed, late twentieth-century scholarship has emphasised how Ompteda's hero, Grotius himself, borrowed extensively from, and often relied upon, not only the theological writings from Salamanca, but also a wide range of late-Medieval jurists. The latter provide the vast majority of Grotius' legal authorities, and yet, they are completely erased from Ompteda's historical horizon. The Age of Enlightenment could be far more disparaging towards the Middle Ages than the Renaissance, and that attitude would cast a long shadow over legal-historical scholarship during the nineteenth and twentieth centuries.

Specifically with regard to international law, modern biases were strengthened for different reasons. Until the 1980s, it was still common to conceive international law mainly, if not almost exclusively, as a branch of the law applicable between sovereign states. That quasi-monopoly of sovereign states seemed to become clearly recognisable, to a modern observer, from the seventeenth century onwards. Only in more recent times have scholars more readily acknowledged that the very concepts of sovereignty and sovereign state are historically determined, and cannot be used as constant yardsticks throughout the centuries. Moreover, at the same time, present-day international law has admitted the increasing reality in theory and in practice of a heterogenous, multi-layered international community, and has therefore largely abandoned the paradigm of the sovereign states' monopoly in international relations. At the same time, following a comparable development in different areas of domestic law, international lawyers' recognition of a less monolithically conceived international community has encouraged a greater acceptance of different forms of normativity coexisting and interacting with a legal normativity. Another factor has been the inability or unwillingness of legal scholars to accept that pre-modern legal methods differed substantially from their own conceptual framework. Medieval jurisprudence, for example,

largely ignored the taxonomy of legal branches. Law was not systematically studied, or dealt with in legal literature, by “subject”. The absence of a general systematisation of the law by subject-matter entailed a different approach to legal reasoning. One practical result was that, looking at a Medieval law library, modern scholars did not find (apart from very few exceptions) any monographs or specific parts of the multi-volume legal works on Roman and canon law which dealt specifically with international law or any topic now associated with the categories of international law. The conclusion was all too quickly reached that the conditions for recognising in Medieval times anything coming close to the modern concept of international law were not fulfilled, and that Medieval legal scholarship had ignored international law as a topic of study.

The cultural prejudice expressed by Ompteda towards Medieval legal scholarship was in some ways already abandoned within a generation, witness von Savigny’s *History of Roman Law in the Middle Ages*, published in 1815. Yet, Medieval civil law studies long remained in the shadow of mainstream legal historiography. After the Second World War, the *Ius Romanum Medii Aevi* project (“the new Savigny”) reflected a more determined and concerted effort by legal historians throughout Europe to tackle the sources of Medieval civil law scholarship. However, the focus of such studies was mainly on private law, less frequently on public law, and Medieval civil law scholarship on international law remained by and large uncharted waters.

By the last quarter of the twentieth century, legal historians had become more familiar with the structure and workings of Medieval civil law scholarship. At the same time, the late-Medieval and sixteenth-century intellectual and scholarly archaeology of the authors and works which were regarded (by Ompteda and many later authors) as landmarks in establishing early-modern international law scholarship was now attracting more sustained attention. Taking on board Medieval legal scholarship faced a number of hurdles. For most works, scholars rely still today on printed editions ranging from the late-fifteenth century to the first quarter of the seventeenth century. The reliability of these editions, which sometimes reflect different textual traditions, remains questionable. A systematic verification in extant manuscripts is usually not feasible. So far, only fragments of the Medieval works on civil and canon law are available in a modern critical edition, and there are no prospects that this will change in the foreseeable future. The increased access, over the past few years, to digital versions of many of those multi-volume works has much improved the prospects of a more systematic research, but for practical purposes, a selection of the available editions will still be required, often with only a few indicators which may assist in making that selection. Such difficulties affect all areas of Medieval civil law studies.

Once the researcher has settled on a selection of particular imprints (and perhaps some manuscripts), another difficulty arises. There is no general repertory, and the indices in the old editions do not provide a satisfactory alternative, for identifying comprehensively the passages which may be relevant on a specific topic, let alone an anachronistically defined category such as ‘international law’. What makes the exercise even more daunting is that practically any text of the *corpora iuris*, and therefore the commentaries which discuss these texts, is potentially relevant for a study on international law. That was because a classification by subject-matter of the textual materials included in the civil and canon law compilations was largely non-existent, and because the Medieval methods allowed extensively the borrowing of a notion or rule, or their application as a general principle, in a completely different context from that of the original text. The major Roman law compilations comprised a high proportion of texts pertaining to what in a modern view would be regarded as private law. As a result, notions and rules which had originated in private law could be adjusted to what a modern lawyer would consider to be entirely different areas of legal scholarship. Even in early-modern times, the need to fall back on Roman law-based jurisprudence meant that the emerging scholarship on specific issues of international law continued to borrow extensively from private law. Today, a few principles and notions still

used in international law are reminiscent of those Roman private law borrowings (e.g. *occupatio[n]*, *uti possidetis*, *rebus sic stantibus*...). For the legal historian working on Medieval scholarship, it means that a comprehensive reading of the legal literature following the *ordo legalis* (the sequence of texts in the compilations of Roman law, and, by extension, of canon and feudal law used in the universities) is required in order to catalogue all statements on issues which both a historian and a modern lawyer may identify as issues of international law. Although some specific texts became standard *loci* or *sedes materiae*, i.e. they were used as conventional references for discussing particular topics, and may therefore facilitate research in the works of different authors, such standard references were not generally acknowledged and only a detailed reading of the whole work by any author is the safest course if one wants to avoid the risk of missing out a relevant point of doctrine.

Those are well-known features of Medieval legal scholarship, but few modern lawyers, or even legal historians who are not used to work with Medieval civil or canon law sources, will be aware of them. They highlight the formidable preliminary task Dr. Dante Fedele had to tackle before writing the present monograph, which is probably the most all-round study on Medieval international law scholarship ever published.

The research resulting in this monograph was sponsored by the Flemish Organisation for Scientific Research (FWO) and hosted by the Legal History Department of the University of Leuven's (KULeuven) Law Faculty. The financial means available made it possible to plan a research programme carried out by a single researcher during a period of just over three years. It may be obvious that this limited timeframe implied that the researcher who was to be entrusted with this project would have to be already well acquainted with late-Medieval civil law studies, and preferably also with the specific conceptual and methodological issues when dealing with international law during the last centuries of the Middle Ages. It was very fortunate that Dr. Fedele, who had already written an outstanding dissertation on ambassadors during the transition from the late Middle Ages to early-modern times, was prepared to accept the brief. It was also obvious that a comprehensive study of late-Medieval international law scholarship could not be envisaged within the limits of available financial and human resources. The project submitted to FWO therefore proposed to carry out a 'pilot study' focusing on international law in the work of the fourteenth-century Italian jurist Baldus de Ubaldis. The choice of Baldus was evident. He was one of the most important jurists of the Medieval civil law tradition, and his teaching and works encompassed the three main traditions of the Medieval 'learned law', i.e. Roman law, canon law and feudal law. In addition, he was one of the most prolific authors of another characteristic genre of legal literature in his days: the learned legal opinions (*consilia*). That breadth of scholarly production by a single jurist of that calibre is unique. It allows us to contemplate through the work of one jurist the whole range of text-based scholarship (lectures, commentaries) and it offers a detailed insight into the legal practice in (mostly: Northern and Central) Italy. Baldus' work, in other words, provides a prism for observing and analysing late-Medieval scholarship on international law as a whole. Of course, that does not mean that his work is comprehensive, but as this carefully laid-out monograph shows, it offers a reliable vademecum for any reader interested in a vast range of topics of international law in the Middle Ages, and also for any future research on late-Medieval international law.

Projecting the phrase, and beyond the phrase, the concept, of international law to the late Middle Ages was a decisive step. It had remained somewhat axiomatic in the project's original outline, but the approach receives from the outset proper attention in Dr. Fedele's monograph. It is a decisive step, because once the potential misunderstandings of such an anachronistic projection are avoided, it paves the way for applying present-day categories of international law, recognisable to a present-day international lawyer, in mapping out the structure of the research. The exercise could only be successfully completed by reformatting the notion of international law and its categories so as to ensure that they are used as hermeneutical tools reflecting the Medieval perspective itself. That is why the book starts

with an extensive examination of the nature and structure of (if one may pursue the use of modern phrases for the purpose of the exercise) the international community and its actors in Baldus' legal landscape.

The Second Middle Ages witnessed in the Latin West the dawn of a new political culture. The Roman Church, in the wake of the Gregorian Reform, recycled civil law studies in its own management schools, the faculties of canon law. Its success prompted secular polities to employ the expertise attributed to civil lawyers for shaping their own public governance. Thus, the ideal of an efficient and just government became tributary to its conforming to the rule of law defined by legists and canonists. The legal matrix of the *buon governo* was first and foremost developed in the Italian law faculties and spread from there to the Latin West, bolstered by the foundation of universities. Legal science's primary vocation was to function as the expertise in the art of good, and therefore legitimate, governance. Good governance applied not only with respect to domestic policies, but also in the political continuum extended to the foreign affairs of the polity, or, to use once again the by now domesticated anachronism, to international relations. Thus, the rule of law culture which impregnated the ideal of good governance became also the hallmark of international governance. In order to work out this ideal, jurisprudence relied on the same general reservoir of Roman and canon law texts and scholarship which were used for developing the domestic governance. However, the diversity of more or less self-governing polities interacting with each other raised the question of a framework of governance (and therefore a conceptual legal framework) in which those interactions could be subjected to norms of good governance. The standard answer was to refer to the imperial and pontifical authorities as supreme powers of a political system in which the individual polities were integrated. Dr. Fedele provides a detailed analysis of how Baldus, in spite of his misgivings about the emperor's weakened position vis-à-vis the Italian city states, and about the debilitating effects of the Great Western Schism affecting the papacy, maintained those authorities as necessary references to a universal political order, however theoretical they may have been. It provided the foundation for a hierarchy of legitimate political actors in their mutual relations, and it justified at the same time their subordination to the jurisprudence developed in the law faculties. The successive chapters in the present monograph show that Baldus nevertheless fell back on that framework, theoretical as it was, not only in his doctrinal expositions on specific topics of international law (in lectures and commentaries), but occasionally also in his legal opinions when dealing with real-life (and sometimes high-profile) political controversies.

The picture of Baldus' international community and its actors may at first glance suggest some similarity with today's perception of a multi-layered international community comprising different types of actors. The similarity may be misleading. The international community is never a permanent stable entity. The long-term dynamics of Western political history from the Second Middle Ages onwards are conventionally highlighted as the gradual consolidation of territorial principalities or city-states which achieved, at different scales, a relative concentration of powers over the myriads of local political actors which had asserted a degree of autonomy after the disintegration of the Carolingian Empire. However, from a different perspective, the dynamics may look to have developed in the opposite direction: from the conceptual unity of the Latin West (the "Res publica Christiana"), or at least from the ideological construct of the Holy Roman Empire, towards an increasing autonomy of self-governing polities. Whichever perspective one favours, the end result by the early-modern period was a multitude of sovereign states without any overarching institutional framework (though it may be pointed out that during the eighteenth century, the concept of *Droit public de l'Europe* was an attempt to bring those sovereign states within a universal European system governed by its own rational normativity). Because Baldus adopted the conceptual frame of reference of a universal empire and Church, his doctrine faced the dynamics of an increasing break-up of that universality, whereby competing political actors within a notional common political order were progressively replaced by single, exclusive sovereigns in each

particular territory, without any overarching authority. In that sense, the recent acceptance of a diversity of heterogeneous empowered political actors in today's international community confronts international lawyers with the opposite tendency which marked the transition from the late-Medieval to the early-modern international community. Dr. Fedele avoids the pitfalls of such constructions by offering an understanding of what was purported to be a universal community and its actors from Baldus' own vantage-point and reasoning. Whenever he discusses a *consilium* by Baldus, the reader is informed about the political constellation and (whenever possible) about the interests at stake, so as to appreciate the adduced arguments and principles in context.

The *consilia* play an important part in the present monograph. Much more is at stake here than supplementing the 'law in books' (the commentaries) by the 'law in action' (the *consilia*). Dr. Fedele's discussion of these *consilia* shows how they sometimes reflect Baldus' hesitations and uncertainties, his cautious approach to conflicts of interest and power relations, but at the same time, how the cases which required the drafting of such legal opinions were also instrumental as a touchstone for legal doctrines, and how they may have contributed to revising or finetuning the doctrines developed in his teaching and commentaries. Possibly, this was even more true for international law topics because of the relative paucity of texts on such topics in the *corpora iuris*. In any event, the most obvious titles of the Digest and the Code on issues of, particularly, the law of war, were apparently not commented by Baldus, so that his *consilia* document all the more his civil law reasoning on those issues. Particularly relevant in this context is the constant dialectical approach combining what applied *de iure* and what the practice was *de facto*, whereby the latter did not refer to a normative vacuum. This dialectical discourse allowed a degree of flexibility, whether in order to widen the field of actors who could be given a status in diplomatic exchanges, or to give legal effects to the rights and duties of collective actors or even individuals in the laws of war and warfare.

Even though Baldus does not offer any comprehensive or systematic outline of international law – such works would only develop in early-modern times –, his work offers a broad array of building-stones on international law issues, which, on the whole, show a strong degree of consistency. Those building stones would be intensively reprocessed by the legal writers of specific works who gave (as Ompteda a.o. rightly observed) a new impetus to international law literature. From then onwards, the new scholarly edifices would conceal the late-Medieval materials which had been incorporated in the systematic doctrinal constructs of the seventeenth century and later on. Dr. Fedele's study reveals the nature and scope of those materials through Baldus' work. Historians who follow Ompteda's advice to 'skip the Middle Ages' will fail to recognise a substantial part of modern international law's hidden structure.

Almost two centuries after Ompteda's work was published, the French Medieval historian Régine Pernoud published a book aimed at a general public in which she vented her (and with her, many Medieval historians') exasperation at the negative clichés which even by the end of the twentieth century remained attached to the very notion of Middle Ages. It was called *Pour en finir avec le Moyen Âge*, but that title certainly was not intended as a call for abandoning Medieval studies. It was an invitation to replace the negative concept of those centuries by acknowledging their positive contribution to the development of mankind. The English translation of the book opted for a more straightforward title: *Those Terrible Middle Ages: Debunking the Myths*, which somehow strengthens, in contrast to the French original, the Middle Ages as a periodisation in its own right. While the phrase 'Middle Ages' nonetheless endures, historical scholarship has since then moved on. Late Antiquity and early Middle Ages now tend to form a more coherent object of historical studies than when they were separated by distinct specialisms, while at the other end, the phrase Renaissance Studies has sometimes enjoyed a revival by reuniting the late-Medieval centuries and the early-modern times until the mid-seventeenth century and sometimes beyond. In legal history, in particular, the direct influence of the late-Medieval culture until the first decades of

the seventeenth century has for a long time been recognised. That is not to say that the 'Italian' legal scholarship (*mos italicus*) survived unscathed the changes in the political, religious, economic and cultural landscape of Western Europe during the fifteenth and sixteenth centuries. Baldus' reliance on the Emperor and the Roman Church as universal authorities underpinning the whole edifice of an international community was further eroded at an accelerated pace. The Holy Roman Empire's extension to Italy became no more than a memory, and North of the Alps its significance was hollowed out by the strengthening of the territorial princes' self-government. In Rome, the papacy's claims to universal authority were lastingly thwarted by the Protestant Reformation and the sustained tendency, among the rulers' countries which remained Catholic, to subordinate ecclesiastical policies to their own *raison d'état*. Many technicalities of international law which Baldus and other late-Medieval jurists had worked out could often nonetheless still apply, but early-modern jurists would now have to fit them in a new system and framework.

Dr. Fedele's monograph will no doubt become a necessary work of reference for any scholar interested in the history of international law. Even those tempted to 'skip the Middle Ages' will still need to find here the building blocks of 'classical' international law. But it may be hoped that this monograph will also fulfil its role, originally intended when it was still a project, as a pilot study. In the first place, it will be a stepping stone towards any other research into Medieval international law scholarship. Additionally, it will also serve as an elaborate case-study on how late-Medieval legal scholarship was still hanging on to the original purpose of legal science as the science of good governance. Beyond the specific doctrines on particular areas of international law, Dr. Fedele's study of Baldus shows how in the area of international governance, jurists sought to marshal different expressions of normativity under the rule of law based on civil law jurisprudence. Today's abundance of international law rules in many more areas than a century ago may give the impression that more than ever, international governance is founded on international law. That impression may be deceptive. In both traditional areas such as the law of war or the law of diplomacy, or in more recent areas such as space law or environmental law, or even in areas which historically fall in-between new and old, such as international economic and trade law, the re-emergence of a variety of actors on the international scene has once more generated manifold expressions of normativity. Whether or not lawyers will be able to channel these expressions into a system of legal normativity, as their Medieval predecessors successfully did through their jurisprudence, will be one of the major issues of international governance in the twenty-first century.

*Alain Wijffels*