

**Opening of the International Law Association 78th Biennial Conference
Sydney
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**The Hon Susan Kiefel AC
Chief Justice of Australia**

I am grateful for this opportunity to speak at the opening of this important Conference on “Developing International Law in Challenging Times” hosted by the Australian Branch of the ILA.

On behalf of the Australian judiciary I welcome delegates from overseas. It seems appropriate to hold the 78th Biennial Conference of the ILA in this region, given that it has, in recent times, produced some significant issues for international law.

Many of the papers to be delivered at the Conference will focus on the question of how international law should be developed now and in the future. These may be called challenging times. But of course it has always been such times that have seen major advances in the development of international law. And it is often the case that our understanding of a present position and of future direction is facilitated by what has gone before, in particular how international law has been shaped by the course of history.

It has been suggested that the “basic concepts of international law” can be traced back thousands of years¹. There are examples of ancient near eastern rulers entering into treaties more than four millennia ago. For example, in about 2100 BCE, the rulers of two Sumerian city-states entered into a treaty establishing the border between them which was “to be respected by both sides under pain of alienating a number of Sumerian Gods”².

¹ Malcolm Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 14.

² Malcolm Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 14. See also Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan Company, revised ed, 1954) 1-2; Amnon Altman, *Tracing the Earliest Recorded Concepts of International Law: The Ancient Near East (2500-330 BCE)* (BRILL, 2012) 8-9; David Bederman, *International Law in Antiquity* (Cambridge University

In the classical period the Greek city-states were said to be “linked” by numerous treaties³. Like other early civilizations, they developed particular customs about the conduct of war⁴. But, as one author observes, in retrospect, the rules observed by the Greeks were in reality intermunicipal and religious. They did not relate to “a broad conception of a family of nations”⁵. The ancient Romans also approached wars and treaties from a religious perspective⁶.

Over time these religious customs faded, though the idea of “just war” remained⁷. In the first century BCE Cicero was able to write:

“The only excuse ... for going to war is that we may live in peace unharmed ... [N]o war is just, unless it is entered upon after an official demand for satisfaction has been submitted, or warning has been given and a formal declaration made.”⁸

The rediscovery of Roman law in the middle ages “reinforced the idea that law could structure or at least moderate the relations between kingdoms,

Press, 2001) 139; Gerhard von Glahn and James Taulbee, *Law Among Nations: An Introduction to Public International Law* (Routledge, 2017) 24.

³ Malcolm Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 16.

⁴ See Malcolm Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 15-16; Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan Company, revised ed, 1954) 9.

⁵ Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan Company, revised ed, 1954) 9.

⁶ Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan Company, revised ed, 1954) 10.

⁷ Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan Company, revised ed, 1954) 11.

⁸ Cited in David Bederman, *International Law in Antiquity* (Cambridge University Press, 2001) 222.

principalities, and republics”⁹. In the 13th century, scholars such as Thomas Aquinas “revived” the Roman doctrine of just war¹⁰.

Increasing trade led to the development of an “embryonic international trade law” as maritime customs came to be accepted in continental Europe and the English law merchant “was declared to be of universal application”¹¹.

It is perhaps unsurprising then that, beginning in the 14th century, medieval scholars and canonists began to address topics such as war, diplomacy, trade and treaties in their treatises¹².

The rise of modern nation states in the 15th to 17th centuries “led to a higher degree of interaction between sovereign entities and thus the need to regulate such activities in a generally acceptable fashion”¹³.

It has been said that the writings of the Spanish scholars de Vitoria and Suarez in the 16th and 17th century “mark[ed] the very beginning of modern international law doctrine”¹⁴. These early international law scholars, together with important personalities such as Grotius and Pufendorf, gave consideration to the

⁹ James Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 4.

¹⁰ Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan Company, revised ed, 1954) 35 (St Augustine), 36-37.

¹¹ Malcolm Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 19-20; see also Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan Company, revised ed, 1954) 27-35.

¹² Randall Lesaffer, “Roman Law and the Intellectual History of International Law” in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of The Theory of International Law* (Oxford University Press, 2016) 38 at 48.

¹³ Malcolm Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 20.

¹⁴ Randall Lesaffer, “The Medieval Canon Law of Contract and Early Modern Treaty Law” (2000) 2 *Journal of the History of International Law* 178 at 179

natural law and positive law foundations of international law¹⁵, as well as to ideas of equality between States¹⁶ that pervade international law thinking to this day¹⁷.

Particularly well-known is the work of Hugo Grotius, sometimes referred to as “the father of international law”¹⁸, which is said to have “form[ed] the synthesis and culmination point of sixteenth-century scholarship ... as well as the transition point to the classical writers of the seventeenth and eighteenth centuries”¹⁹.

Much as war had provided the backdrop for the development of many early rules,²⁰ Grotius’ experience of the Thirty Years’ War influenced his famous treatise

¹⁵ On de Vitoria and Suarez see e.g. Annabel Brett, “Francisco de Vitoria (1483-1546) and Francisco Suarez (1548-1617)” in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 1086 at 1087-1091. On Grotius see e.g. Hugo Grotius, *The Law of War and Peace* (1625); Malcolm Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 23-24. On Pufendorf see e.g. Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan Company, revised ed, 1954) 149; on Grotius; Hugo Grotius, *The Law of War and Peace* (1625) bk 1, ch 1, 14. See generally, e.g., Malcolm Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 22-27; James Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 7-8.

¹⁶ Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan Company, revised ed, 1954) 149.

¹⁷ On the importance of sovereign equality in modern international law, see, e.g., James Crawford, “Sovereignty and Equality of States” in *Brownlie’s Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 447.

¹⁸ Renee Jeffrey, *Hugo Grotius in International Thought* (Springer, 2006) 15.

¹⁹ Randall Lesaffer, “Roman Law and the Intellectual History of International Law” in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of The Theory of International Law* (Oxford University Press, 2016) 38 at 55.

²⁰ See above and e.g. on the lengthy history of the laws of war: Mary Ellen O’Connell, “Historical Development and Legal Basis” in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press, 3rd ed, 2013) 1 at 15-26. 16ff; Amanda Alexander, “A Short History of International Humanitarian Law” (2015) 26 *IEJIL* 109, 111-112; further Kenneth J. Keith, ‘Some Thoughts About Grotius, Four Hundred Years On’, *Seventeenth Annual Grotius Lecture* (2015) *ASIL Proceedings*, 3 at 6 (“the law controlling resort to armed force should not be seen as recent”).

“On the Law of War and Peace” published in 1625²¹. It addressed not only just causes of war but also just conduct during war as he sought to humanise that conduct. It was one of the first attempts to systemise international law. Grotius observed:

“That body of law ... which is concerned with the mutual relations among states or rulers of states, whether derived from nature, or established by divine ordinances, or having its origin in custom and tacit agreement, few have touched upon. Up to the present time no one has treated it in a comprehensive and systematic manner; yet the welfare of mankind demands that this task be accomplished.”²²

After Grotius died in 1645 the Peace of Westphalia reflected his ideas in establishing “principles of non-intervention, religious tolerance and the peaceful settlement of disputes”²³.

The debate about the idea of the law of nations as positive law or the product of natural law theory, which was imbued with religious concepts, continued until the end of the 18th century, when positivism became the dominant international legal theory.

In the 1780s positivist Jeremy Bentham developed the term “international law” to replace “law of nations” as a means of emphasising that only States were the subject of this body of law²⁴. He wrote that the “mutual transactions between

²¹ See, e.g., Mary Ellen O’Connell, “Historical Development and Legal Basis” in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press, 3rd ed, 2013) 1 at 19.

²² Hugo Grotius, *Prolegomena to the Law of War and Peace* (1625).

²³ Mary O’Connell and Lenore VanderZee, “The History of International Adjudication” in Cesare Romano et al (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press, 2014) 40 at 43.

²⁴ William Slomanson, *Fundamental Perspectives on International Law* (Cengage Learning, 2010) 196.

sovereigns” were “the subject of that branch of jurisprudence which may be properly and exclusively termed international”²⁵.

The nineteenth century saw many developments. Many of these related to war and dispute settlement, such as the treaties entered into at the Congress of Vienna, following the end of the Napoleonic Wars; the Treaty of Paris ending the Crimean War, and the Paris Declaration Respecting Maritime Law. The International Committee of the Red Cross was established and the first Geneva Convention entered into. The Convention for the Pacific Settlement of International Disputes, which established the Permanent Court of Arbitration, was signed, together with the Convention with respect to the Laws and Customs of War on Land and the Convention for the Adaptation to Maritime Warfare of the Geneva Convention.²⁶

The two World Wars and other wars of the twentieth century were to be a test for the application of many of the principles thus far created and for significant further developments, including the ultimate outlawing of the use of force in international relations in Article 2(4) of the Charter of the United Nations²⁷, important advances in international humanitarian law²⁸, and the emergence of international human rights norms²⁹. All this is well known to you as matters of the more recent past.

²⁵ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789) 325.

²⁶ See generally Malcolm Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 27-28; Mary Ellen O’Connell, “Historical Development and Legal Basis” in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press, 3rd ed, 2013) 1 at 20-23.

²⁷ See James Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 14, 746-747.

²⁸ See e.g. Malcolm Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 1169-1170, on the 1949 Geneva Conventions.

²⁹ See e.g. James Crawford, “International Human Rights” in *Brownlie’s Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 634.

The important point that may be gleaned from this brief foray into history is that, while international law necessarily builds on what has come before, as a leading academic and practitioner concluded:

“concepts of law as of politics and other disciplines are firmly rooted in the world of reality, and reflect contemporary preoccupations. No theory develops in a vacuum, but is conceived and brought to fruition in a definite cultural and social environment.”³⁰

The challenges for today and for the future of international law are as difficult as they have been in the past. Looking at the laws regulating conflict, which have proved so important to international law’s development, we are now faced with a situation in which wars may be of a wholly different kind, including involving different, non-State, participants³¹.

As to other fields, the law of the sea now has many dimensions. Outer space will provide other challenges. International environmental law is attracting global momentum³². Historically, international law has always developed in response to challenges and must continue to do so.

International law must also concern itself with important linkages. I understand Lord Mance will speak of linkages between private and public

³⁰ Malcolm Shaw, *International Law* (Cambridge University Press, 6th ed, 2008) 24.

³¹ See e.g. Arnaud Blin, “Armed groups and intra-state conflicts: the dawn of a new era?” (2011) 93 *International Review of the Red Cross* 287; Federica Paddeu, “Use of Force against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-Defence” (2017) 30 *Leiden Journal of International Law* 93; Christian Tams, “The Use of Force Against Terrorists” (2009) 20 *European Journal of International Law* 359; Michael Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press, 2nd ed, 2017).

³² See e.g. United Nations Framework Convention on Climate Change Secretariat, “The Paris Agreement”, available at <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> on the ratification of the Paris Agreement.

international law, and Dr Ward on the intersection between international treaties and executive and legislative power in nation states.

This Conference will provide a forum for debate of many important issues affecting international law and its development. The ILA, with its broad and global membership, occupies a special position in advancing the understanding and progress of international law worldwide. I have no doubt that the many contributions which will be made by the speakers and by the delegates to this Conference will substantially further the objectives of the ILA, in particular to promote the study, clarification and development of international law.

I hope that overseas delegates enjoy their stay in Sydney.