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Contextual Research in Law (CORE)

How to defend utopianism

Legal discourse in the nineteenth century international peace movement (1815-1873)

Much of this is a story of failure. So go not only most historical assessments of the achievements of the international peace movement of the nineteenth century, but also some of the reflections of its own members.[1] Looking back on what has been accomplished as the century drew to a close, Élie Ducommun (1833-1906), who would receive the second Nobel Peace Prize in 1902, quoted a member of the French National Convention of 1793 on what he did during the reign of Terror: *'J'ai vécu, c'est déjà quelque chose!'*[2] Ducommun felt pacifists could relate. From the moment the first societies began to speak out against war at the end of the Napoleonic era, all collaborators, calling themselves *'amis de la paix',* suffered through immense amounts of indifference or ridicule in society, and even more so in politics.[3] Internally, their movement was continuously wracked by ideological divisions, which often proved insurmountable.[4]

Yet, by 1899, the peace movement was not only still standing, but had grown in membership, had been able to convince parliamentarians to join forces in the Inter-Parliamentary Union, and was awaiting the results of the conference that was hard at work in the Hague, convened by none other than the czar. These evolutions seemed not only propitious to the long-awaited turning of the tide in public opinion, but also testament to the strength of will of the movement's founders, who, for many decades, had worked in inhospitable environments, and without much success during their own lives, to replace the *droit de la force* with *la force du droit.*[5] How could all this not have been influenced by the efforts of the pioneering peace societies?

Similarly, the temptation for a modern scholar is considerable to approach any legal-historical analysis of the early peace movement, from the founding societies of 1815 to the international law societies of 1873, from an evolutional perspective. In these histories, the researcher selects

[1] Most historians acknowledge that the impact of peace societies in their own time was very small, of which most peace friends, hardly naïve, were acutely aware. For instance. V. ZIEGLER, *The Advocates of Peace in Antebellum America*, Indianapolis, Indiana University Press, 1992, 9; S. COOPER, *Patriotic Pacifism. Waging War on War in Europe, 1815-1914*, Oxford, Oxford University Press, 9; M. CEADEL, *The Origins of War Prevention. The British Peace Movement and International Relations, 1730-1854*, Oxford, Clarendon Press, 1996, 19.
[2] É. DUCOMMUN, *Précis historique du mouvement en faveur de la paix,* Berne, Boneff, 30.
[3] An untold number of examples exist. To cite only the *Revue des deux mondes*, an organ of elite liberal opinion in France, on the large Paris Peace conference of 1849, where Victor Hugo spoke of *les États-Unis d'Europe: 'L'Angleterre a du bonheur avec ses excentriques'*. "Chronique de la quinzaine", *Revue des deux mondes,* vol. 3, 1849, n° 5, 873-875. Generally speaking, liberal papers were the most sympathetic, though not unanimously so.
[4] In just the American Peace Society, the absolute non-resistants split from the society in 1838, and the society as a whole virtually abandoned its pacifism at the outbreak of the Civil War, alienating them from the British peace friends. ZIEGLER, *Advocates, op. cit.,* 49, 149-176.
[5] DUCOMMUN, *Précis, op. cit.,* 30-31.

an international legal norm or instrument, and proceeds to trace back its genealogy.[6] This kind of methodology corresponds to the basic juridical method of moving 'meaning across time', considering professional international lawyers necessarily act 'anachronistic', because modern-day international law continuously draws on the past as a source of legitimation or of legal obligation.[7] As succinctly put by Anne Orford, long-time paragon of this school, 'international law is inherently genealogical'.[8] Unsurprisingly, this method has traditionally been a popular one, especially among lawyers interested in history, but not necessarily trained as an academic historian.[9]

Admitting to be such a non-historian lawyer himself, the present author consequently ought to feel an instinctive affinity to genealogical methodologies, only nudged further in this direction by his objective to analyse the legal discourse of a civil society movement, most schemes of which were explicitly intended to reform positive international law and politics. As such, it would certainly be possible to compose a largely optimistic narrative of a 'heroic' movement, which may have suffered its share of tribulations along the way, but whose hard sacrifices were ultimately vindicated, as the movement ended up playing a significant part in the establishment of the present-day rule of *ius contra bellum,* embodied in the Charter of the United Nations, legally prohibiting the discretionary use of force.[10]

Indeed, those rare scholars who have already taken a lawyer's look at the early peace movement have mostly done just that, arguing in standards such as the *Oxford Handbook of the History of International Law* that the movement between 1815 and 1945 enjoyed 'considerable success in influencing international legal norms, the development of institutions, and the negotiation of treaties regarding arbitration, humanitarianism, and arms control'.[11] Another author, speaking specifically about the early peace activists, claimed that the impact of pacifists was 'crucial' in contributing to a climate in which international law could be seen as 'fundamentally a good

[6] R. LESAFFER, "International Law and its History: the Story of an Unrequited Love", in M. Craven, M. FITZMAURICE, and M. VOGIATZI (eds.), *Time, History and International Law,* Den Haag, Martinus Nijhoff, 2006, 34-35.
[7] A. ORFORD, "On International Legal Method", *London Review of International Law,* vol. 1, n° 1, 2013, 174-175.
[8] Ibid., 175.
[9] A recent example of an explicitly genealogical analysis is found in H. SIMON, "The Myth of Liberum Ius ad Bellum: Justifying War in 19th-Century Legal Theory and Political Practice", *European Journal of International Law,* vol. 29, n° 1, 2018, 113-136; LESAFFER, *Unrequited Love, op. cit.,* 34.
[10] As described, for instance, in O. CORTEN, *Le droit contre la guerre,* Paris, Pedone, 2014, 2, 875-879.
[11] C. LYNCH. "Peace Movements, Civil Society, and the Development of International Law", in B. FASSBENDER and A. PETERS (eds.), *The Oxford Handbook of the History of International Law,* Oxford, Oxford University Press, 2012, 198-199, 218-219. Lynch spoke about the movement as a whole, not just the early societies.

thing', rather than just an instrument of war-like diplomats and sovereigns.[12] Several nineteenth century peace plans have been promoted to 'precursors' of twentieth-century institutions, such as the League of Nations or even the United Nations.[13]

Unfortunately, many such theses can be nuanced by more contextualist counter-narratives. In a seminal early article of international law's 'turn to history', Randall Lesaffer delivered a biting critique of ill-conceived evolutional history-writing by lawyers, which has in the past frequently sinned 'against the most basic rules of historical methodology', pockmarked by 'anachronistic interpretations'.[14] The warning is timeless. While not discrediting the work done by the earlier mentioned authors on the peace movement, some of their assertions are sometimes based on only limited investigations into contexts, or a small number of primary sources. The early peace movement was neither homogenous, nor existing in an intellectual vacuum. When it can thus be read, for example, in a chapter entitled 'American exceptionalism', that the American Peace Society's first president William Ladd (1788-1841) 'deserves to be reckoned a visionary', little if any mention is made of any of the following factors: pacification schemes outside of the U.S., within and without peace societies, previous peace plans, ongoing theological, economical, and cultural debates, power struggles within societies, the intricacies of national and international politics, or the reception history of propaganda.[15] Elements such as this heavily influence any assessment of the originality or impact of any given actor, and would be taken into account by most academic historians.

Overall, though, the soup is rarely eaten as hot as it is cooked in the perennial debate between lawyers' histories and historians' histories. Both genealogical and more contextualist histories are valuable, are not as incompatible in practice as they may seem in theory, and any preference is determined by the specific research questions asked of the research subject.[16] Relatively novel socio-legal studies of 'vernacular' legal discourse by non-state actors, such as that of nineteenth century pacifists, certainly do not exclude the possibility of genealogical analyses, focusing on

[12] M. W. JANIS, *America and the Law of Nations, 1776-1937*, Oxford, Oxford University Press, 2010, 91.
[13] For example LYNCH, "Peace Movements", *op. cit.*, 205; see also C. LANGE, "Histoire de la doctrine pacifique et de son influence sur le développement du droit international", *Recueil des cours de l'Académie de droit international de la Haye*, vol. 13, n° III, 1926. Other examples abound.
[14] Many lawyers continue to repeat 'myths' long-since debunked by historians, such as the mistaken notion that the Peace of Westphalia established the principle of state sovereignty. Incidentally, Stéphane Beaulac used Mark Weston Janis as an example. S. BEAULAC, *The Power of Language in the Making of International Law*, Leiden, Martinus Nijhoff, 2004, 67-71; LESAFFER, *Unrequited Love*, *op. cit.*, 34.
[15] M. W. JANIS, "North America: American Exceptionalism in International Law", in B. FASSBENDER and A. PETERS (eds.), *The Oxford Handbook of the History of International Law*, Oxford, Oxford University Press, 2012, 536.
[16] V. VADI, "International Law and its Histories: Methodological Risks and Opportunities", *Harvard International Law Journal*, vol. 58, n° 2, 2017, 340, 350.

the development of positive international law, which would be the most immediately persuasive thesis, for its optimistic message that sees one-time failure justified in the end. However, that would necessitate investigations into sources and timeframes beyond that of the lifetimes of the early peace friends, in order to determine whether, for instance, any specific publications were known to later scholars and politicians.[17] This certainly merits attention, but such analyses do not constitute the primary concern of the present author's research, interested firstly in activism on its own terms, even if a credible evolutional argument will still be made.[18] Not that much is known right now of early legalist pacifism, especially that which took place outside of Anglo-American spheres. The starting map still has to be filled in. Furthermore, citizen activism carries with it its own distinct contextual specificities, that do not always translate well into established categories of legal formalism.[19] Presentism typically robs us from the richness of the law's past, capable of revealing myriad creative alternatives to what we think of as self-evident today.

Several examples can render all this less hopelessly abstract. Legal-historical scholarship that approaches old pacifist propaganda from the perspective of the U.N. or the I.C.J., or any other aspect of modern *ius contra bellum,* will likely overlook what the peace campaign was trying to accomplish back then. Sticking to the topic of 'persuasiveness', why did plans for a congress of nations or for stipulated arbitration suddenly pop up in the 1830s and 1840s in the British and American peace societies, as well as in various European countries? Multiple explanations exist, but a significant factor included that around this time societies were transforming from religious-philanthropical organizations into political lobbying groups.[20] Precisely when they began to preach beyond the choir, and sought to persuade often deeply sceptical citizens and politicians, friends of peace turned to legal argument. Dismissed as 'utopian' now – as well as by plenty at the time – the turn to international law represented a significant step away from the conviction that Christianity alone could bring peace, in favour of a pragmatic and common

[17] Otherwise, one risks drawing on correlation, rather than causality. Indications do suggest, however, that sustained efforts of pacifists helped popularize ideas of world courts or of international organization. James Brown Scott called William Ladd a founder of the 'scientific and practicable peace movement'. Numerous other potential causalities exist, both direct and indirect. J. B. SCOTT, *Peace through Justice. Three Papers on International Justice and the Means of attaining It,* New York, Oxford University Press, 1917, 2.
[18] Mainly within the confines of the nineteenth century. For instance, peace friends founded the International Law Association, and several members of the *Institut de droit international* were members of peace societies.
[19] J. K. COGAN, "A History of International Law in the Vernacular", *Journal of the History of International Law,* v. 22, n° 2-3, 2020, 207-208.
[20] S. CONWAY, "The Politicization of the Nineteenth-Century Peace Society", *Historical Research,* vol. 66, n° 161, 1993, 275.

language that educated political elites might be more receptive to: law. A message has to be tailored to one's intended audience.[21]

Many of the intricacies of peace friends' legal arguments will similarly fly under the radar when they are viewed through the lens of modern positivism. While they certainly invoked a number of familiar devices, like doctrine or case law, early pacifists often also turned to domestic legal instruments, derived from constitutional law or even civil law. International legal histories have been largely global in scope, yet local contexts are indispensable to understand how normativity was approached by the international peace movement, in reality a composite of individuals and societies rooted in specific countries, even if one that tried to cultivate international networks.[22]

The domestic analogy powerfully fuelled the imagination of pacifist intellectuals. The Belgian lawyer Louis Bara (1821-1857), for instance, drew on Pandectist legal theory for his vision of a *codex iuris gentium* that would legally bind states internationally, just like the *code civil* bound citizens on the national level.[23] Ladd based himself on the American constitutional model for the division of powers within his congress of nations.[24] In Switzerland, Jean-Jacques de Sellon (1782-1839), founder of the *Société de la paix de Genève*, connected law to history and culture. This European peace friend campaigned for the *grand dessein* of the French monarch Henri IV (1553-1610) and his advisor the duke de Sully (1560-1641), pleading for a *tribunal arbitral et permanent* to be installed, to be complemented and modernized by analogy to the constitutional instruments of his homeland.[25] All three believed politically viable solutions could be concocted from what was already known and valued in contemporary intellectual circles.

Returning to the larger question of how this more synchronic, contextual approach to vernacular legal discourse can contribute to the historiography of international law, the honest answer must be a realistic one. This doctoral research attempts mainly to provide an empirically substantiated legal analysis of a strand of political thought during the mid-nineteenth century, using analytical

[21] Many politically active citizens would have studied law, one of the few university degrees. In most states and decades, peace activism mainly attracted the bourgeoisie, since the lower classes had little to no political voice. The extent to which this 'pragmatism' was in turn effective stands as a related, but separate research question.
[22] VADI, "Histories", *op. cit.*, 328-332.; V. LINCOLN LAMBERT, "The Dynamics of Transnational Activism: the International Peace Congresses, 1843-51", The International History Review, vol. 38, n° 1, 2016, 127.
[23] W. DE RYCKE, "Legislating Utopia. Louis Bara (1821-1857) and the Liberal-Scientific Restatement of International Law in the Nineteenth Century Peace Movement", *Journal of the History of International Law*, advance article, 2020, 25-28.
[24] W. LADD, *An Essay on a Congress of Nations, for the Adjustment of International Disputes without Resort to Arms*, Boston, Whipple and Damrell, 1840, iv, 13-16.
[25] The cult of *'le bon roi Henri'* lived prominently in French cultural life under the Bourbon Restoration and the July Monarchy. Sellon saw Switzerland as a miniature model of Europe. D. THOMAS, *Henri IV: Images d'un roi entre réalité et mythe*, Pau, Héraclès, 1996, 284-288; J.-J. DE SELLON, *Recueil des lettres adressées aux archives de la société de la paix par son président*, Genève, Gruaz, 1832, 301.

tools that are foremost suited to that purpose. While this will preclude any inappropriate attempt at 'heroization', analysis of the legal politics of the earliest non-sectarian pacifists can still yield insights about its functioning in other places and times, through careful analogy.[26] This becomes particularly relevant in light of 'Law and Society' approaches in modern legal studies, which recognize non-state actors as a relevant factor in international law-making processes.[27] More generally, any research is persuasive that is based on well-argued historical evidence, aware of methodological limitations, and reluctant to draw too grand conclusions from the data used.[28]

Ultimately, perhaps, the most convincing argument in favour of any modern study of a largely unsuccessful nineteenth century utopian movement lies not in abstract methodological quibbles, but in philosophy and modern action. The early *amis de la paix* touched upon the core aspiration of modern international law. In that sense, it has to be admitted that the idea of permanent and universal peace sounds like an impossible project, then as now. It is difficult not to think of the myth of Sisyphus, condemned to push a rock up a mountain for eternity, only to see it roll down again. Likewise, it is easy to respond cynically when looking at the nineteenth century peace friends from the perspective of 1914, or at the present regime from its seeming ineffectiveness.[29] Yet Sisyphus was not a pathetic character to Albert Camus (1913-1960). Rather, he symbolized the absurd hero who hated death and cherished life. That which was to be the source of his tragedy, grew into an ultimate act of defiance against vengeful gods, for Sisyphus never ceased his labours, despite fully realizing its apparent futility. As for mythology, thus for international law. Today's idealistic lawyers should take comfort in the long history of the liberal-democratic international legal project. Each time one generation disappeared in yet another bloodbath, new

[26] L. BENTON, "Beyond Anachronism: Histories of International Law and Global Legal Politics", *Journal of the History of International Law*, v. 21, n° 1, 2019, 3; the present author does not wish to write a moralistic history that unequivocally casts *amis de la paix* as 'good guys', projecting modern moral standards on the past, as some are prone to do even in academia, especially in the United States. Perfectly 'legitimate' or at least explainable reasons existed why contemporaries could be hostile to the movement, such as its blindness to social justice, which is why Karl Marx did not hold *amis de la paix* in high esteem. Also: *'Qui veut faire l'ange fait la bête'.*
[27] According to Valentina Vadi, however, 'L&S approaches remain underused'. VADI, "Histories", *op. cit.*, 339.
[28] Any scholar, historian, lawyer, or otherwise, can use a thus-defined narrative of the early peace movement as a secondary source, whether for specific legal-historical context, or as part of a larger conceptual analysis. Perhaps modern formalist lawyers will experience the most cognitive dissonance, since much of it deals with *lex ferenda*. Though they had not read Martti Koskenniemi, many pacifists intuitively sensed that international law could not be disconnected from politics. Maybe because they so irreverently treated formalist aspects of law – criticizing internal contradictions and 'sophistries' – and incorporated law into a larger platform, early pacifism has been disregarded by lawyers, trained to ignore texts that appear to be 'non-legal'. See also A. BIANCHI, *International Law Theories. An Inquiry into Different Ways of Thinking*, Oxford, Oxford University Press, 2016, 26-28
[29] If statistical analyses are to be believed, 'the pattern in the post-1945 era is not substantially different from patterns in the nineteenth century'. The present study does not seek to enter into the politically charged debate on the merits of modern use of force law, merely observing that a mainstream of today's legal scholarship believes a *ius contra bellum* to exist. M. R. SARKEES and F.W. WAYMAN, *Resort to War. A Data Guide to Inter-State, Extra-State, Intra-State, and Non-State Wars, 1816-2007*, Washington D.C., CQ Press, 2010, 562.

activists stood up from the ashes, most of them aware they would never see the end of war.[30] In the aftermath of the onslaught that wiped away the world as the *amis de la paix* knew it, new institutions and norms were developed, as happened again after 1945. Whether the current legal regime will last, is anyone's guess, but the story of the earliest organized peace crusaders should persuade both lawyers and citizen activists to begin the climb anew each day.

[30] To an extent, this ignores the millenarian expectations of many of the early religious pacifists, who believed Christ would descend on earth to inaugurate a thousand years of peace. To atheists like Camus, this motivation amounts to a flight into false comfort. A. CAMUS, *Le mythe de Sisyphe,* Paris, Gallimard, 1942.