HISTORY OF INTERNATIONAL LEGAL DOCTRINE IN THE INTELLECTUAL LEGACY OF VOLODYMYR HRABAR

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A place of prominence in the national science of international law belongs to Volodymyr Hrabar (1865–1956), academician of the National Academy of Sciences of the Ukrainian SSR.[1] Hrabar has been described as «a link connecting the Russian prerevolutionary and the Soviet science of international law».[2] He devoted special attention to the historical aspects of international law (the classical positivist science of international law of the second half of the nineteenth century acknowledged the insufficient research into the history of international law and the need to turn to the origin and historical development of international legal elements when studying their essence and special features).

The greatest achievements in studying the history of international law belong to the nineteenth-century German School as the successor to the historical school of law reflected in the works of Friedrich C. von Savigny (1779–1861), Georg Puchta (1798–1846), and others. The impact of this School on the development of the history of international law may be attributed to its basic approach: analyzing legal phenomena by studying their historical shaping. Hrabar maintained that the central place in this cohort belongs to G.-F. von Martens: «The historical-positivist orientation received general approbation in international law and came to the forefront in the nineteenth century, primarily thanks to works by Martens; in this connection, he is seen not only as a prominent representative, but even the founding father of contemporary interna-

[1] Hrabar was elected full member of VUAN (Ukrainian Academy of Sciences) in 1926. However, in conformity with the Statute of the Academy dated 14 June 1921, «full members of the Academy shall be approved by the Narkompros [People's Commissariat of the Enlightenment]» (section V(4)). Because of disagreement with his ideology, the collegium of the Narkmpros never confirmed Hrabar as an academician (following amendments to the Academy Statute, Hrabar was entered in the list of members as having been actually elected). Mykola Skrypnyk, the then chairman of Narkompros, wrote about Hrabar in the journal Прапор Марксизму [Banner of Marxism] as a «reactionary who pursued pro-Moscow policies in Galicia». It was probably because of the above persecution that Hrabar never agreed to the proposal of Academician M. Vasylenko to move to Kyiv and start working there.

[2] *V. N. Durdenevskii*, «Владимир Грабарь (1865–1956)», in V. E. Hrabar, Материалы к истории литературы международного права в России (1647–1917) [Materials on the History of the Literature of International Law in Russia (1647–1917) (Moscow, 1958), p. 5; *A. T. Uustal,* «В. Э. Грабарь в Тартуском университете» [V. E. Hrabar at Tartu University], Правоведение [Jurisprudence], p. 19.

tional legal history».[1] Under the impact of ideas of the German nineteenth-century positive international law (in particular, K. Bergbohm, A. Bulmerincq, and others), the Tartu school of international law was developed by Hrabar.

However, his predecessors merely stated the need to study historical aspects of international law (paying certain attention to historical development of this law and to bridging gaps in this science), whereas Hrabar proceeded further. First, he did not view the history of international law merely as producing an overview of the development of this legal system. To comprehend the essence of a certain phenomenon of international law, Hrabar thought it was necessary to identify the mechanism of its coming into existence, the factors impacting it, and the specifics of its subsequent development. Second, Hrabar examined the history of this law itself, unlike his predecessors, the German positivists. They thought of international law merely as of that which had been shaped by the so-called «Westphalian system» (in fact, they saw the origin of international law in this system); for classical positivist doctrine, everything that had existed previously was at best pre-law, or the early beginnings of international law, but not law in its proper sense. That Hrabar held a contrary view is confirmed by his article on the original meaning of the Roman term *jus gentium*,[2] which analyzes the essence of international law by identifying the mechanism and features of this legal system. In opposition to the then classical approach (claiming that international law came into being in the second half of Middle Ages), Hrabar not only showed that its origin dated back to inter-tribal links of Roman communities, but also demonstrated that the law of nations was extant when municipal law had come into being (later this idea influenced the argumentation on behalf of the primacy of international law).

In all Academician Hrabar wrote about 200 works on the history of international law.[3] He demonstrated the flaws of earlier research on this matter. This, he believed, also accounted for errors in studies of modern international law. Hrabar attempted to view most issues at hand against their historic background by making use of historical methodology and examining specific international law institutes from the point of view of their origin and historical development.[4]

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[1] *V. E. Hrabar*, «Мартенс» [Martens], Энциклопедический словарь [Encyclopedic Dictionary] (Spb., 1896), vol. XVIIIa, p. 690.

[2] *V. E. Hrabar,* «Первоначальное значение римского термина *jus gentium*» [The Original Meaning of the Roman Term *Jus Gentium*], Учёные записки Тартуского государственного университета [Scientific Notes of Tartu State University] (Tartu, 1964). — Issue 148. — 42 p. See also *V. E. Hrabar,* «Первоначальное значение римского термина *jus gentium*»[The Original Meaning of the Roman Term *Jus Gentium*], Антологія української юридичної думки: Том 8. Міжнародне право [Anthology of the Ukrainian Legal Thought: Vol. 8. International Law] / edited by V. N. Denysova (Kyiv, 2004), pp. 476–508.

[3] According to the overview of the fullest bibliography of Hrabar, W. E. Butler enumerates 188 works. See: *V. E. Hrabar*, Материалы к истории литературы международного права в России (1647–1917) [Materials on the History of the Literature of International Law in Russia (1647–1917)] (M., 2005), p. xxxvi.

[4] *V. Hrabar's* works include an essay on the river law history, the first paper of its kind («On International Rivers», 1888); «The Status of Foreigners among Ancient Jewry» (the candidate dissertation of the author); the first work on the history of air law («History of Air Law», 1927); as well as «International Law: Manual» (1892), reviewing its history; «War and International Law» (Scientific Notes of Juriew University, no. 4 (1893)) on the legal formation of the concept of war, including legitimate war, and studies in the history of international law science — «*De legstorum jure*» (Juriew, 1918); «Science of International Law in England before the Reformation» (1917); «The Concepts of Natural Law and International Law in the English Literature of the 12th — 16th Centuries»; «The Matters of State and International Law in John Mair's Comments to Sentences by Peter Lombard» (Notes of the Ukrainian Academy of Sciences (1927), V–VI; «The Role of Hugo Grotius in Scientific Development of International Law» (1925); «Beitrag zur Geschichte der Staatswissenschaftlichen Literatur im Zeitalter des Hugo Groot» (Jurjew, 1897); «Esquisse d'une histoire literaire du droit international au moyen age du IV au XIII siècle» (Revue du droit international, 1936), vol. XVIII, IX; «L'Epoque de Bartole (1314–1358) dans l'histoire du droit international» (Paris, 1900); «Issues of International Law in Legal Consultations of Bald» (Petrograd, 1917) etc. Based on the historical method are also Hrabar's articles on the theory and practice of international law in the dictionary of

Hrabar's achievements fall into the following four areas: (1) history of international law in the nineteenth and twentieth centuries; (2) history of international law in the Middle Ages; (3) analysis of international law practices of the USSR; and (4) history of the science of international law (particularly in Russia)[1]. However, Professor W. E. Butler identified nine categories of Hrabar's works on international law (in accordance with the relevant period of his research). In addition to studies of international law history in the Middle Ages and in ancient times, he points to the encyclopedic articles of Hrabar, his biographical research, reviews (critiques), works (articles and books) dedicated to certain aspects of international law theory, and also singles out a separate category including the then classical textbook of F. Liszt on international law translated and elaborated by Hrabar. This is one of the most significant works by Hrabar which got the Austrian author's appreciation and recognition of Hrabar's position. It is no accident that this book, following the commentary by Hrabar, came to be known in the academic community by an unofficial name «Hrabar/Liszt Textbook». One of the most interesting chapters of the textbook is devoted to the history of international law, where Hrabar presents his own vision of the shaping and development of this law in conformity with his concept of its origin and historical peculiarities.

On the whole, one may distinguish the following areas of Hrabar's academic interests: (1) works on the general theory of international law; (2) articles on actual issues of international law, including its practical aspects in the late nineteenth and early twentieth centuries, as well as actual issues of the emergence of new institutes and branches of this law; (3) the history of the formation and development of international law in practical terms (that is, the mechanism of birth and the special features of the shaping of its individual institutes, principles, and branches, with matters relating above all to the law of war, in which Hrabar took a special interest); and (4) the history of international legal doctrine.

The latter aspect can be broken down into research on the history of international legal doctrines proper (see below) and the history of studies of this law. Thus, Hrabar authored a fundamental work on the literature of international law, international law bibliography, - the genre of the theory of international law that emerged and enjoyed popularity in the nineteenth century (and even in the early twentieth century) but, unfortunately, failed to take root in the science of international law: «Materials on the History of the Literature of International Law in Russia (1647–1917)».[2] Among the early works on this subject was that by the German jurist, Ompteda, on the literature of all natural and positive international law, published in 1785. The views of Ompteda served as the basis for works by A. Bulmerincq, K. Nevolin, A. Horovtsev, V. Danevskyi, and others. However, his work remained practically unknown in the twentieth century scholarship (excepting studies of Ompteda's views by Hrabar and the prominent American student of international legal history, Arthur Nussbaum, who called Ompteda the first historian of international law). Most works on the his-

Brokhaus and Efron: «Coastal Sea», «Blokade», «Military Contraband», «War», «War and International Law», «Military Neutrality», «The Hague Conferences», «International Treaty», «Geneva Convention», «Conquests», «Condification of International Law», «Congresses and Conferences», «Consuls», «Contribution», «Neutrality», «Ratification», «Reprisals» etc.

[1] *V. Durdenevskyi,* Владимир Грабарь (1865–1956) [Vladimir Hrabar (1865–1956)], Грабарь В. Э. Материалы к истории литературы международного права в России (1647–1917) [V. E. Hrabar. Materials on the History of International Law Literature in Russia (1647–1917)] (M., 1958), p. 8.

[2] *V. E. Hrabar,* Материалы к истории литературы международного права в России (1647–1917) [Materials on the History of International Law Literature in Russia (1647–1917)] (M., 1958). — 491 p.

tory of international law published in the nineteenth century were essentially studies of its literature or of national schools. A classic example of this approach was the three-volume history and literature of sciences about the State by Mohl published in 1855.[1] No wonder that this methodology made possible the genre of international law bibliography.

The well-known works on the history of the literature international law were surveys and simultaneously a substantive contribution to the history of this law.[2] Most lacked analysis.[3] Hrabar's work was part of this nascent genre, and, in the opinion of colleagues, «although Hrabar entitled his all-encompassing overview of the status of development of international law in Russia as «materials» for the history of the literature of international law in Russia, in fact his book has all the characteristics of an analytical, scientific, and bibliographical study».[4] In addition to a simple review of works on various individual aspects of international law, Hrabar offered his own vision of their special features and their strengths and weaknesses.

Of the aforementioned categories of Hrabar's contributions, one needs to mention his works on the theory of international law. They may be broken down into works on general theory and those dealing with individual branches of international law.

Hrabar's unique sense of what is of true interest in this area deserves comment. Contemporary (including Ukrainian) doctrines of international law reduce almost every new institute of this law to the branch level. Examples are international law of the sea, air law, space law, law of international security, environmental protection law, and others generated by scientific and technological progress or developments in information technologies. Western international lawyers often describe this as the fragmentation of international law, which expands into new spheres of social relations. Frequently, however, the reason is actually the complexity characteristic of the science of international law in establishing the criteria for shaping and delineating its institutes: «The impossibility of identifying the criteria for the development of the system of international law has resulted in the science of international law lagging behind the practices of this law system's development. The situation proved so complex that some authors often spoke of the criteria for the development of the system of international law meaning in fact the criteria for the development of a branch of international law and vice versa. However, the same conclusions were also drawn regarding the criteria for setting up international law institutes. [...] The most negative consequences of this lack of identification of criteria for the creation of international law branches was the formulation of an unlimited number of branches and mixing up branches and institutes of international law. Practically, there does not exist a single branch of international law which would not be reduced to the level of an institute by one of the scholars».[5]

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[1] *R. Mohl,* Die Geschichte und Literatur der Staatswissenschaften. In Monographien Dargestellt (Graz: Akademische Druk — U. Verlagsanstalt, 1960), 3 B.

[2] *V. Danevskyi,* Очерк новейшей литературы по международному праву [An Essay on the Newest Literature on International Law] (Saint Petersburg, 1876); *V. E. Hrabar,* Материалы к истории литературы международного права в России (1647–1917) [Materials on the History of International Law Literature in Russia (1647–1917)] (M., 1958).

[3] See *P. Macalister-Smith, J. Schwietzke,* Bibliography of the Textbooks and Comprehensive Treatises on Positive International Law of the 19th Century, Journal of the History of International Law, vol. 3, no. 1 (2001), pp. 75–142.

[4] *W. E. Butler,* «Владимир Эммануилович Грабарь (1865-1956). Библиографический очерк» [Vladimir Emmanuilovich Grabar (1865–1956). Bibliographical Essay], В. Э. Грабарь. Материалы к истории литературы международного права в России (1647–1917) [Materials on the History of International Law Literature in Russia (1647–1917)] (M.: Zertsalo, Systema Harant, 2005), p. XL.

[5] *V. H. Butkevych,* «Система міжнародного права» [The System of International Law], Міжнародне право. Основи

Unfortunately, even renowned international lawyers were not free of this flaw (for instance, A. Heffter, who differentiated «International procedural law and war» and «Spying» within the system of international law, broke down his system into things, rights and persons, or included in his system «international administrative law», and so on. The book on «international radio broadcasting law» written in 1928 by the Ukrainian international lawyer, V. M. Koretsky[1] is another example. One year before Koretsky, Hrabar had published his studies of another modern (at that time) branch of international law, the «history of air law» and analyzed its development more accurately.[2]

Of more interest is Hrabar's analysis of the general theory of international law, in particular, the principle of equality, the role of State sovereignty, and international judicial personality in general. In the early twentieth century Hrabar published several works devoted to a revision of the traditional approaches and concepts related to international legal personality. Among them were works on the origins of State equality in contemporary international law (1912), the current crisis in the principle of equality (1914), where the author revealed an aspect that was unexpected for an era of the universal nature of international law, namely, lack of actual equality of States and even the inexpediency thereof. He said: «Over the previous three hundred years, the view has been firmly established in the history of international law under which States are legally recognized as being equals. This origin of State equality became the foundation of the new international law, a kind of dogma of this new law. Heretical thoughts expressed occasionally in the recent doctrinal writings in favor of recognizing the origin of State inequality have been suppressed by the general choir recognizing the generally-accepted origins of equality. A strange dissonance in this choir was the requirement dictated by life itself for States to be recognized as unequal, and not only in fact, but also in legal terms. This requirement was called for by the differences in the interests of large and small States, which has become obvious of late ... One thing is beyond all doubt: inter-State relations are currently undergoing an acute crisis. We are at a cross-road. States are obviously turning from the old path of disorganized relations and taking a new trail just being blazed, the path towards more stable international organization. At the same time, the origins of State equality on which the old system was built are likewise in crisis, and one may expect in the new system a more conspicuous departure from these origins towards recognition of the origins of legal inequality».[3] Moreover, Hrabar did not view inequality as the principle of conquest, hierarchy, or subjugation in international law; instead, he merely demonstrated its conditionality and voiced his criticism of the generally-accepted etatist statement regarding State sovereignty as the principal foundation of international relations. His idea was to create an international legal order where, on one hand, the actual inequality of States is not suppressed (as the existence of more or less influential States) and, on the other hand, this situation is recognized and a balance of interests is established between such States.

теорії: Підручник [International Law. Foundations of Theory: Textbook] (K.: Lybid, 2002), pp. 149–150.

[1] *V. M. Koretsky,* «Международное радиоправо» [International Radio Broadcasting Law], Сборник статей кафедры «Проблемы современного права» и правового факультета Харьковского института народного хозяйства [A Collection of Articles by the Department of Modern Law Issues and Law Department of the Kharkiv Institute of National Economy] (Kharkiv, 1928), no. 2, pp. 123–142.

[2] *История* воздушного права: Сборник [History of Air Law: Collected Works] (M., 1927).

[3] *V. E. Hrabar,* Начало равенства государств в современном международном праве [The Beginnings of State Equality in Modern International Law] (Saint Petersburg, 1912), pp. 1, 20.

Quite doubtful is the principle of population laid down by Hrabar as the cornerstone of this legal order to replace the principle of sovereign equality of States and of «State fetishism». Yet the author's approach, although open to question, represents the sentiment of change that emerged in inter-State law at the beginning of the previous century and of the crisis in the Westphalian system: «Sooner or later, an inter-State organization will come into being. It may be resilient and stable only if it is founded not on a fictitious equality of States, but on their actual equality in the form of equal participation of equal groups of the population ... If one is freed of the cult of State fetishism and stops kneeling before an idol in the form of a State as a living being, it becomes clear that the population of Russia or Great Britain cannot be given a voice equal to that of the population of Luxembourg, Costa Rica or Panama ... A transition from fictitious to realistic equality is urgently required by life. We have seen already that a stable inter-State organization is impossible while preserving the origins of equality of abstract units called States».[1]

The critique of the State approach and of the principle of sovereign equality of States as the foundation of an international legal order is taken up again by a number of modern writers in the early twentieth century in connection with their investigation of State sovereignty in international law of the twenty-first century: «During the initial decades of the twentieth century and particularly during the period between the two [world] wars, international law was undergoing a fundamental transformation ... The old classical legal thinking — based on the principle of absolute sovereignty, the standard of civilization, and legal positivism — gave way to a new legal sensitivity that criticized absolute sovereignty, protected the interest of international community, and supported anti-formalist legal doctrines».[2]

It is when studying the crisis of an excessively etatist approach to international law that Hrabar identified the transition at that time to a new stage: the establishment of a new legal order with a multiplicity of subjects. Hrabar was assisted in seeing the dynamic nature of international law as a system capable of changing and accommodating new conditions by his experience as a historian of law. «Jurists», he believed, «are especially vulnerable to this kind of short-sightedness and often find themselves in a situation when they no longer understand events unfurling around them. Suffice it to recollect how vehemently sixteenth-century lawyers used to support the formula of the universal monarchy of Emperors at a time when this actually no longer existed and new States, independent of the empire, were developing. A jurist and a historian see things in different ways. Jurists may be forgiven for clinging to old and obsolete formulas. Being a jurist, a lawyer is accustomed and obligated to fit the phenomena of life into recognized legal molds and formulas. However, this is not the proper path for a historian and observer of contemporary life. He must notice and capture in the entire flow of life all those streams that may, having taken shape, gradually give a new direction to the flow itself».[3] This exemplifies the seemingly paradoxical departure of Hrabar as a representative of the classical positivist school of international law (as emphasized correctly by a student of his work: «the development of Hrabar as a scholar proceeded mainly under the influence of the ideas of the

[1] *V. E. Hrabar,* Начало равенства государств в современном международном праве [The Beginnings of State Equality in Modern International Law] (Saint Petersburg, 1912), pp. 43.
[2] See *A. B. Lorca,* «Sovereignty Beyond the West: the End of Classical International Law», Journal of the History of International Law (Martinus Nijhoff Publishers, 2011), vol. 13, no. 1, p. 8.
[3] *V. E. Hrabar,* Начало равенства государств в современном международном праве [The Beginnings of State Equality in Modern International Law] (Saint Petersburg, 1912), p. 33.

positivist school of international law that prevailed at Tartu University, where he had worked for about 25 years»)[1] from the principal foundations of positivism — the State basis of this law — and its emergence during the European Middle Ages.

Other works by Hrabar devoted to the issues of his time exhibit their timeliness: the legal status of straits discussed at the Lausanne conference (1923); the legal structure of contemporary trade agreements (1923); the jurisdiction of a foreign State in the modern doctrinal writings of Italy (1927); commercial arbitration in international contracts (1926); the criminal liability of war criminals (1945), a joint article with A. N. Trainin: what goes without saying is the actuality of this matter not only for post-Nuremburg international legal doctrine, but also for its contemporary theory and practice. «From the history of international legal systems» (we have noted above the problems involved in studying the system, systematization, and structure of international law, and this article is probably the only study in the Soviet Union of scientific systematizations of international law, an analysis of their peculiarities, special features and shortcomings; on the whole, this work may in part be characterized (being based on the method of analysis applied) as belonging to a study by Hrabar of the history of international-legal views.[2]

These works are of special value because the author is capable (regrettably, this ability has virtually disappeared in modern scholarship) of choosing successfully a method to look into the corresponding issue of international law and combining various methods of analysis.

However, of special interest to Hrabar has always been the history of international legal thought. One should single out Hrabar's contributions to this issue because the history of Schools of international law is a relatively recent branch of the general theory of this law and in fact only at the stage of inception.

Because there is no separate discipline addressing the history of schools of international law (one can name today merely a few works devoted specifically to this subject),[3] scholars who pursued this subject-matter had to contend with works from other branches of knowledge. Therefore, researchers approached views on the history of international law by tapping into philosophy or the history of philosophy, political and legal doctrines, doctrines on State and law, international relations, and others. The authors focused on lists of names, biographical data and scholarly opinions rather than a systemic analysis of the history of the science of international law. Obviously, they lost with this approach either the purely international aspects of this subject-matter or its legal essence. In the opinion of Koskenniemi, «traditional works on international law studied the subject from the point of view of great epoch-making transformations, wars, systems of norms, works and biographies of outstanding lawyers. There has been no attempt made to study international law from the positions

[1] *K. O. Savchuk,* Міжнародно-правові погляди академіка В. Е. Грабаря: Монографія [International Law Views of Academician V. E. Hrabar: Monograph] (K.: V. M. Koretsky Institute of State and Law, National Academy of Sciences of Ukraine, 2003), p. 122.

[2] This list of V. E. Hrabar's works see in: *V. E. Hrabar,* Материалы к истории литературы международного права в России (1647–1917) [Materials on the History of International Law Literature in Russia (1647–1917)] (M.: Zertsalo, Harant System, 2005). — 881 p.; *K. O. Savchuk,* Міжнародно-правові погляди академіка В. Е. Грабаря: Монографія [International Law Views of Academician V. E. Hrabar: Monograph] (K.: V. M. Koretsky Institute of State and Law, National Academy of Sciences of Ukraine, 2003), pp. 87–121.

[3] *D. Bederman,* The Spirit of International Law (Athens & London, 2002); *M. Villey,* Lecons d'histoire de la philosophie de droit (Paris, 2002); *J.-C. Billier* and *A. Maryoli,* Histoire de la philosophie de droit (Paris, 2001); *A. A Merezhko,* История международно-правовых учений: учебное пособие [History of International Legal Doctrines: Instructional Manual] (Kyiv: 2004) etc.

of sociology of an international system».[1] However, it seems that the use of the term 'sociology' here is doubtful, because the author has in mind a purely international law approach, that is, a comprehensive analysis of the history of this law, taking into account the development of the international system and law.

Hrabar's work on the original meaning of the Roman term *jus gentium* may be characterized as setting out his concept regarding the period, mechanism, and regular features of the emergence of international law. Although it is devoted primarily to the historic (material, applied) issue proper — the identification of the timing and factors involved in the emergence of this law — it also, in a way, is an example of an analysis of the history of international law thinking. In fact, this work consists of two parts: an analysis of the views of early thinkers, those of the Middle Ages, and modern scholars regarding the time of the emergence of international law and the essence of *jus gentium*, and then a statement of the author's concept itself.

Having analyzed the views of scholars on the essence of *jus gentium*, Hrabar concluded that the denial of its international-law nature was an idea dating to the seventeenth to nineteenth centuries (F. Laurent, F. F. Martens, G. Bonfils, P. Fauchille, M Taube, and others). The reason was to be found in the approach to previous historical epochs of international law from a modern position held by the relevant scholars. The views of those who discarded the interpretation of jus gentium as international law were based on the two standpoints: (1) rejection of the possible existence of international law in ancient times and (2) identifying the law of the Roman people with jus fetiale instead of jus gentium (which they considered to be civil or international private law). Specialists in this law from past ages (Gentili, Grotius, Zouche) had been convinced that the jus gentium was international public law.[2] Proceeding from a detailed analysis of all the above views, Hrabar put forward his own vision of the international-legal essence of *jus gentium*.

As to Hrabar's concept of the origin of international law, it was follows: «It is necessary first to reject the biased thought that international law did not exist in ancient times ... Romans were aware of international law in the sense in which this term is being used in our times. Its origin is to be sought in inter-clan relations of the pre-class society; at that period it received the name *jus gentium*. Originally, there existed only inter-clan and inter-tribal «law» (*jus gentium* or simply *jus*). With the emergence of the Roman State community, this diverged into international law, which retained its original name of *jus gentium*, and national law, — *jus Quirtium,* and later *jus civile*»[3].

Hrabar referred to the Roman Empire period not as international-legal thinking per se, but merely the pre-conditions for its formation or its individual beginnings (although this seems strange, given his idea of the early pre-State origin of this law, and likewise the lengthy period of the existence of international law «in practice» prior to the Roman Empire, as well as the fact that the doctrine played the role of being the origin of law, which makes one think about an earlier origin of the first ideas of the objective realities of international relations and of the law that regulates them). In his opinion, «the point of departure for studies of the impact of Roman law

[1] *M. Koskenniemi*, The History of International Law Today: www.helsinki.fi/eci/Publications/Koskenniemi/MHistory
[2] *V. E. Hrabar*, Первоначальное значение римского термина *jus gentium* [The Original Meaning of the Roman Term *Jus Gentium*], Учёные записки Тартуского государственного университета [Scientific Notes of Tartu State University] (Tartu, 1964). — Issue 148. — p. 7.
[3] Ibid., pp. 7, 38.

and its interpreters on the creation and development of international law teachings may be the collections of laws put together on the orders of Emperor Justinian in the sixth century, which later was named the *Corpus Juris Civilis*, as they are known today. Interpretations of these collections served as a pretext for jurists of the Middle Ages to express their views on relations between nations. Those views subsequently, with international law classified as a separate branch of jurisprudence in its own right, were taken over by the latter and became general legal theories ... The fragments of international legal provisions reflected in *Corpus Juris Civilis* constituted the first element that linked these collections with the modern European literature on international law».[1]

Therefore it is possible to observe the periods in the development of international law doctrines over its history according to Hrabar (although the author did not set this task for himself, his vision of the stages in shaping these doctrines can be gleaned from his works): (1) the initial beginnings, the early individual thoughts about norms of international law in the works of Roman jurists that had served as preconditions for the subsequent formation of international legal theories; (2) a transitional period, or a stage that does not lie directly along the line of the development of Roman law views and their reception in the Middle Ages; this period is not about the borrowing or developing, but about preserving these views by Christian philosophers of the fourth to thirteenth centuries («in the epoch of barbarism that followed the downfall of the Roman State, it was only the Church, as the successor of to the pen of the latter, that supported and acted as a safeguard of its cultural achievements. It is to the Church that we owe primarily the fact that Roman law did not perish together with the Roman State, but continued to be applied even after the power that had created it ceased to exist. The Roman church, having succeeded the Roman State, assumed its law as well. The Catholic clergy saw Rome as their birthplace; Roman law for them was their own law. Since each tribe in the early Middle Ages had lived according to its own tribal law, the Church and its clergy, as though constituting a separate Roman tribe, were governed by their own law of the past — Roman law ... The latter was the only legal system which specified the status of the church and of clergymen in the State; the systems of barbarian law had not touched on this subject ... The political nature of Roman law was perfectly in line with the non-national mission of the Christian church: it was a single law in a single language to worship God with uniform church rites which served one and the same purpose»;[2] (3) the development of the ideas of Roman jurists on the international law doctrines by glossators and post-glossators (eleventh to fourteenth centuries); and (4) the emergence of national schools of international law (sixteenth to eighteenth centuries).

Hrabar pursued the history of international law doctrines during the Middle Ages «a century and a half after the first attempt by Baron Ompteda to write a history of the literature on international law».[3]

He rejected the traditional view of the emergence of the theory of international law, starting from the works of the 'founding fathers' of this law in the late sixteenth

[1] *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII–XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901, 1901), pp. 1–3.
[2] Ibid., pp. 12–13.
[3] *V. E. Hrabar,* Esquisse d'une histoire literaire du droit international au moyen age du IV au XIII siecle, «Revue du droit international» (Paris: Les Editions Nationals, 1936), vol. XVIII–XIX, p. 7.

to the early seventeenth centuries, in particular those of Grotius and his book «On the Law of War and Peace». The Ukrainian legal philosopher, P. Yurkevych, was of the opinion that «the year of publication of this book (1625) may be considered to be the beginning of the philosophy of law as a separate science».[1] In the opinion of Hrabar, «the founder of the science of international law was not Grotius, but Grotius' predecessor, the Italian jurist Gentili, who had fled the persecutions of the Pope of Rome and settled in England».[2] He agreed on this point with A. Riviere and E. Nys, who also pointed out that there had existed a great number of authors writing on international law in the Middle Ages and later before the publication by Grotius.[3] However, contrary to the aforementioned scholars, Hrabar undertook a more detailed analysis of the international law views of those philosophers.

In his essays on the history of the literature of international law of the Middle Ages from the fourth to the thirteenth centuries, Hrabar broke down the history of international law into periods reflecting the development of views regarding this law. In general, being a proponent of the idea that international law came into being in the ancient (tribal) period, Hrabar dated the emergence of modern international law to the earlier Middle Ages: «The early beginnings of modern international law can be seen as early as the period of the great transmigration of peoples».[4] Contrary to the majority of his contemporaries, who dated the emergence of international law or the beginning of its modern period to the seventeenth century, the Hrabar moved it back to the fourth century AD. Based on this date of the first traces of international law, he proceeded to an analysis.

Hrabar divided the period from the fourth to the thirteenth centuries into three stages: *Stage I* (transitional stage) between the fourth and the eighth centuries (from Pope Leo I in 1440–1461 up to Pope Gregorius I in 1590–1604; St. Ambrose, Bishop of Milan, Augustine of Hippo, and Isidore of Seville in 570–632) as the beginnings of international law; *Stage II* (the eighth century through the second half of the eleventh century) — relations between the Papal and temporal powers and their impact on the shaping of international legal doctrines and ideas; *Stage III* (the late eleventh century through the end of the thirteenth century) — continued conflicts between Otton the Great and the Holy See, Gratian's Decree *(Decretum Gratiani)*, the activities of the decretians, Thomas Aquinas, scholastic literature, and their impact on the development of international legal ideas. This approach to the periodization of international law is primarily about historic developments with regard to the significance and the interpretation of international law rather than about its practices. Therefore, it may be characterized as the first periodization (although it spans a single historic stage) of the history of international legal doctrine.

The views of medieval international law had evolved under the influence of the legacy of Antiquity, where Hrabar identified three major components: the Bible, including the Old and New Testaments; works by philosophers, historians and poets

[1] *P. Yurkevych,* Історія філософії права; Філософія права; Філософський щоденник [The History of the Philosophy of Law; Philosophy of Law; The Philosophical Diary] (K.: Editorial Board of the Ukrayinskyi Svit Magazine, 2000), p. 164.
[2] *V. E. Hrabar, E. M. Fabrikov,* Краткий очерк истории кафедры международного права Московского государственного университета им. М. В. Ломоносова [A Brief Essay on the History of the Department of International Law at Moscow State M. V. Lomonosov University], Труды юридического факультета [Scientific Works of the Law Department] (M.: MGU Publishing House, 1956). — Book Eight. — p. 200.
[3] *V. E. Hrabar,* Esquisse d'une histoire literaire du droit international au moyen age du IV au XIII siecle (Revue du droit international, 1936). — Ibid. — p. 7.
[4] Ibid., p.16.

of classical Antiquity; and Roman law. The impact of Biblical provisions is reflected above all in the commentaries by St. Ambrose and St. Augustine and applied primarily to the concepts of international treaties and the law of war — binding provisions of treaties, binding nature of agreements, legitimacy, and consequences of wars with infidels, and rules of postwar regulation.[1]

Among the philosophers of Antiquity, Hrabar singled out Plato and Aristotle (although «the latter's impact came to be felt starting from the thirteenth century»),[2] and the stoics, whose thoughts had the biggest impact on the medieval legal doctrine. For instance, the idea put forward by Plato and taken up by Aristotle about war as the last resort (waging wars makes sense only provided it results in peace), in Hrabar's opinion, had shaped the entire medieval doctrine of a just war later developed by St. Augustine and Thomas Aquinas. He found in the world of these philosophers of Antiquity the germ of the idea about a «division of international law into the law of peace and the law of war».[3] And the idea of stoics who saw the world as a single large State and law existing as natural law could not be ignored by Church pontiffs in their struggle against secular authorities. Another impact of stoicism had been the idea (embraced by the Christian church) that «war gives birth to greed».[4] The doctrine of Cicero had been planted in the soil of medieval legal thinking primarily in the sphere of the law of war (law of arms), in particular, regarding the requirements for a war to meet if it is to be considered as a just war. One of the first to embrace the idea of prohibiting unjust wars, the arguments of the lawful nature of a war *per se*, and the doctrine of a just war was the early Christian theologian and philosopher, Lactantius (c. 240–320), whose position was advantageous to those who came to develop the medieval Christian concept of a just war and of the lawful nature of wars with infidels (Hrabar relegated Lactantius himself to the transitional early stage of European legal thinking).

Note should be taken of the observation by Hrabar that the attitude to war as a means for the resolution of international disputes had undergone consistent changes in Christian international legal doctrines. Thus, to the early Christians, any violence had been viewed as unacceptable sin, whereas, once the church was sufficiently strengthened in the Middle Ages, their representatives put forward «just war» doctrines as a means of solidifying the power of church (in particular, to substantiate the «Crusades»): «Christians of the early centuries avoided serving in the army, believing it was a sin to murder an enemy, even in an open warfare (Basil the Great, Tertullian, Origen, and Lactantius). Having assumed the status of a State religion in the fourth century, Christianity authorized wars (see the justification of warfare by St. Augustine)».[5]

The study of this impact is more significant in view of the fact that the early Christian philosophers had discarded the achievements of the philosophy of Antiquity as pagan (this was characteristic of the earliest clergy, which is only natural, because the church had to be more aggressive when the church and its relevant theological ideology was in the initial stages of development) during the period

[1] *V. E. Hrabar*, Esquisse d'une histoire literaire du droit international au moyen age du IV au XIII siecle (Revue du droit international, 1936). — Ibid. — pp. 8–9.
[2] Ibid., p. 9.
[3] Ibid.
[4] Ibid., p. 14.
[5] *V. E. Hrabar*, Право войны [Law of War], in I. E. Andrievskyi (ed.), Энциклопедический словарь [Encyclopedic Dictionary] (Saint Petersburg: F. Brokhaus and I. Efron, 1908), vol. XXIVa, p. 877.

when the Christian legal doctrine was yet to be established and there existed merely individual statements of Christian-inclined thinkers. Prior to the First Ecumenical Council of Nicaea in 325 AD (where fundamental Christian dogmas were established), individual Christian ideologues had called for opposition to Greco-Roman idolatry, had opposed the idea that Christians to serve in the army or take part in hostilities, and the like. However, starting from the period between the fourth through the eighth centuries, standing out among the philosophers who developed the new medieval international legal doctrine had been mainly clergy and ideologues of Christianity. This is why Catholic international legal doctrines offered the corresponding interpretation of the international law of Antiquity so as to mitigate the effect of the incompatibility of the norms and institutes of the old international law on the new relations. Its representatives paid major attention to a synthesis of Hellenic-Roman international legal doctrine and of Christian dogmas rather than struggle against that thinking. Among the Church fathers who had returned the achievements of Antiquity into the fold of European legal thought, Hrabar pointed to Saint Lactantius, St. Ambrose, the Bishop of Milan (340–397), and St. Augustine (354–430).

According to Hrabar, the impact of Roman law on international legal doctrines of Antiquity had begun to be felt in the twelfth century and its effect lasted through the end of the fifteenth century (the author ascribes this effect entirely to glossators and post-glossators). However, one can accept this claim with certain reservations. In fact, the early Middle Ages is a period during which the borrowing of Roman law had been, if not active, going hand in hand with the existence of Barbarian law in the new feudal subjects («For several centuries there had existed the norms of international law developed during the previous centuries. They had not been destroyed later. The first barbarian States had actively used the legacy of Roman that they came to possess»).[1] Moreover, having a rather underdeveloped legal technique, the early medieval European nations had actively borrowed from Roman law when developing their own codifications (a collection of laws of Alaric II, king of the Visigoths; the Salic law (lex Salica) of 508; the Langobardic edicts of the late eighth century; the Isaurus Eclogue of 741; the pandect of laws (the Edict) of Theodore, king of the Visigoths in the fifth century — all these are virtually excerpts or interpretations of the provisions of the Institutions, the Digest, the Code and the Novellas of Justinian). Therefore, there is no way one can speak of any termination of the impact of Roman law in those times.

On the other hand, the emergence and the special features of medieval international are characterized by the appearance of statehood of a new type, — a feudal State. The notions of a real ruler, the owner of the country (the feudal lord), came to the forefront in the medieval State. A certain privatization of the State is taking place, when its public powers are often replaced by the personal power of such sovereigns. Many norms of international law are hijacked («privatized»). This came soon to be inconsistent with the requirements of international relations, which found reflection in the expansion of the medieval rule that prohibited «private wars». However, the private law provisions of Roman law were still there to be felt, as Hrabar recognized: «A great many norms of international law have as their origin the application of those

[1] *Yu. Ya. Baskin, D. I. Feldman,* История международного права [The History of International Law] (M.: International Relations, 1990), p. 50.

norms to relations between States similar to the norms of municipal law. It was this approach that gave rise to international private law and international criminal law».[1]

The prominent thinkers of Stage I of the development of medieval international legal doctrines were M. Cassiodor (487–583), Saint Gregory of Tours (538–594), St. Ambrose, the Bishop of Milan / Ambrose of Mediolan (340–397), Aurelius Augustine / St. Augustine (354–430), Popes Saint Leo I (440–461), Gelasius (492–496), and Gregorius I (590–604), as well as A. E. Avitus (460–518) and Isidor of Seville (570–632).

However, the biggest impact on the medieval Christian legal doctrine was made by St. Ambrose, the Bishop of Milan, and St. Augustine, who borrowed from the teachings of the former. These two had been the first to describe the foundations of the new international order in early feudal Europe. As Hrabar pointed out, «elements of the new order were there to see back in the fifth century, when St. Augustine had written his theological-political treatise «On the City of God» *(Civitas dei)*, where he propounded consistently the foundations of Christian theocracy. Life developed further, more or less, as planned by St. Augustine, who managed to capture the principal changes in the new political order of the nations of Western Europe».[2]

Therefore, having made one of the early attempts to systematize international legal doctrines in the fourth to eighth centuries, Hrabar proved that there was no gap between Antiquity and the early Middle Ages so far as the development of international legal doctrines were concerned. Thus, he defined the treatise of St. Ambrose *«De Officio Manastrorum Libri III»*, which is an adaptation of Cicero's treatise *«De Officiis»* («On obligations») to Christian doctrine, as the principal work by St. Ambrose. Otherwise, Ambrose also continued the development of the traditions of Cicero and Lactantius, treating humankind as a pan-human society. However, he differed on this point from stoics, as well as the founding fathers of the Church, who saw the world as a single large State, but proposed a new development of Europe as a conglomerate of Christian States being guided by the foundations of justice and by natural law (these ideas will impact subsequently the codification of canon law, Decretum Gratiani, and is another proof of the continuation of international-legal ideas of Antiquity in European legal doctrine). Finally, elaborating Cicero's doctrine, St. Ambrose differentiated just and unjust wars, laying the groundwork for the traditional Christian doctrine of just wars.[3]

The culmination of the development of the first period of international law doctrine of Antiquity is the activities of St. Augustine, who had proposed the concept of administering the European international legal order, the most widely accepted concept that existed through the period of the creation of the *Decretum Gratiani*. Analyzing the international law views of Augustine, Hrabar defined them as constituting a specific contribution to legal thinking, particularly in the sphere of international legal personality, where Augustine objected to the expediency of the existence of large empires and continued the search for continuity in the international legal

[1] *V. E. Hrabar,* Esquisse d'une histoire literaire du droit international au moyen age du IV au XIII siecle (Revue du droit international, 1936). — Ibid. — p. 12.
[2] *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII-XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901), p. 11.
[3] *V. E Hrabar,* Esquisse d'une histoire literaire du droit international au moyen age du IV au XIII siecle. — Ibid. — pp. 20–21.

ideas of Antiquity and Christianity («we see that some elements of the doctrine on treaties found in St. Ambrose find their development in St. Augustine»).[1] Hrabar concentrated on matters of war in Augustine's concept (it is no accident that Augustine was characterized as «the father of the contemporary concept of a just war», which underlay the Christian tradition, in particular Gratian and Thomas Aquinas).[2] Thus, he claimed that Augustine «contributed to the Middle Ages as much as Grotius for the seventeenth century and for first half of the eighteenth century».[3]

Hrabar divided the entire concept of international law set out by St. Augustine into two parts: the general principles (the functioning) of the international legal order, the participants of international relations and of subjects of international law; compliance with international treaties; and the concept of the law of war. He delineated the principal idea of the concept proposed by Augustine: «The core element of the idea of international law, according to Augustine, is the concept of the unity of human society, or of the city of God». In the opinion of Hrabar, Augustine's awareness of history and, in particular, of the history of Antiquity, had contributed greatly to his development of the concept of international law. Thus, the division of the universe into the city of God *(Civitas Dei)* and the city of earth *(Civitas Terrestris)*, and the formation of the system of the objects belonging to the latter, of the relations between the law of nations and State law (the concept of legal personality, international-legal status of a union of nations, their corresponding hierarchy, and ensuing international rights and obligations is the key to the international legal concepts of Augustine), which is adduced by Augustine by an example (in a comparative aspect) from the Roman Empire and based on the international system of subjects created by that Empire.

Ambrose had been the first to express the elements underlying the doctrine of international law of treaties that were later developed by Augustine. This constitutes a subsequent establishment of the principle of an unswerving compliance with international commitments. Both the doctrine of international legal personality (constituting the establishment of inter-State international law and giving preference to a multi-State system over a «pyramid-shaped» old-time system of international law with a single empire at its summit) and the affirmation of the primacy of an international treaty (also contrary to prior international legal practice) with the principle of the need to comply with it — all these aspects of the international legal views of Augustine (and, to a lesser degree, those of his predecessor, St. Ambrose) testify to the fact that they had understood the advent of the international law of a new type — a feudal international law on the basis of treaties.

One can trace the continuous line of development of the medieval Christian concept of a just war: from the requirements for a just war (the declaration of war and the availability of a just cause for hostilities) according to Cicero to the doctrines of St. Ambrose and St. Augustine borrowed from Cicero (the adaptation of these requirements to the needs of the early Middle Ages, in particular the prohibition of «private wars») and to affirmation of the requirements regarding a just war in *Decretum Gratiani* and the formulation of requirements for waging war as set out in

[1] *V. E Hrabar,* Esquisse d'une histoire literaire du droit international au moyen age du IV au XIII siecle. — Ibid. — pp. 22—23.
[2] *P. Christopher,* The Ethics of War and Peace. An Introduction to Legal and Moral Issues (2d ed.; New Jersey: A Pearson Education Company, 1999), pp. 29—42.
[3] *V. E. Hrabar,* La Doctrine de droit international chez saint Augustin, Archives de Philosophie du droit et de Sociology juridique: Cahier Double. Duexieme Anne (Paris: Receuil Sirey, 1932), no. 3—4, p. 428.

the philosophy of Thomism. Hrabar, analyzing the doctrine of a just (legitimate) war espoused by St. Augustine, paid much attention to the matter of waging wars against infidels and of the possibility for Christians to take part in such wars (whether this accords with the commandments of the Bible).[1]

In his detailed analysis of Saint Augustine's teachings, Hrabar did not, however, take up another important contribution made by that author to the development of legal doctrines. Saint Augustine had become a bridge that brought the international law ideas of Antiquity to the soil of the Middle Ages: in fact, he brought back to Europe the international legal views of Plato (analogous to when the ideas of Aristotle were transferred into medieval legal thought by Thomas Aquinas) and of the Neo-Platonists, Polybius, and others, identifying there some rational ideas to be used in the further development of a medieval State and law; he elaborated the legal ideas of Ancient Egypt, Mesopotamia, and the like. At the same time, Hrabar treated almost exclusively the borrowings or development by Augustine of Cicero's ideas (this may have been due to the fact that among all the other philosophers of Antiquity it was Cicero's ideas of a just war that had been described and propounded to the greatest extent). However, taken as a whole, it is characteristic of Hrabar to focus primarily on Cicero's impact on the shaping of medieval international law thought (as well as on its practices, particularly in the area of building up medieval institutes, the status of aliens, inviolability of envoys, conducting of negotiations, settlement of disputes by arbitration, and others), ignoring the philosophers of Antiquity.

The significance of the just (lawful) nature of wars and the place of a State (particularly of major State) in the community of nations — the two aspects of the international legal views of St. Augustine — were emphasized by Hrabar in the context of legal consciousness as this existed in his times.[2] One could mention in this connection his interest in the place of a State, the principle of equality of States, State sovereignty in international law of the early twentieth century, and the characteristics of this law as international law.

It seems quite strange that Hrabar interpreted the contributions to international law thought made by Isidore of Seville, whom he characterized as the last representative of a transition period of shaping medieval international legal views (in the fourth to eighth centuries). Isidore is known to have offered the definition of international law in his collection of writings called *Origines* or *Etymologiae*, which definition he had borrowed from Ulpian (or, more exactly, a list of areas to which jus gentium applies and the formulation of this subject). Hrabar believed that «the definition of the law of nations to be found in the collection of Isidore of Seville's writings had gained fame in the history of international law. There is no doubt that this represents the definition of a Roman jurist by Ulpian»;[3] «his *Etymologiae* had been a treasure of knowledge, an encyclopedia of a kind from which his contemporaries and subsequent generations derived their scientific information for ages».[4] It had certainly been an encyclopedic work whose purpose lay in the compilation (and transfer of knowledge

[1] *V. E. Hrabar,* La Doctrine de droit international chez saint Augustin, Archives de Philosophie du droit et de Sociology juridique: Cahier Double. Duexieme Anne (Paris: Receuil Sirey, 1932), no. 3–4, pp. 438–442.
[2] *V. E. Hrabar,* La Doctrine de droit international chez saint Augustin. — Ibid. — p. 446.
[3] *V. E. Hrabar*, Esquisse d'une histoire literaire du droit international au moyen age du IV au XIII siecle (Revue du droit international, 1936). — Ibid. — p. 28.
[4] *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII–XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901), p. 14.

to future generations). Obviously, it was the compilation-type nature of this work by Isidore of Seville (who had brought together current information from various branches of knowledge: from medicine and chemistry to astronomy, physics, law, philosophy, and so on) that led the Roman Catholic Church to declare him in 2003 to be the patron of Internet users.[1] However, this (compilation of knowledge and transfer to subsequent generations, particularly in the sphere of international law: «it is to the writings of this period (early seventh century) that we owe the conservation of a fragment of Roman literacy in the pre-Justinian epoch, the fragment that was destined to play a unique role in the literary history of international law. I mean the fragment that lists the institutes of the law of nations»)[2] is what exhausts his merits. This point is proved convincingly by modern studies in international law: «The twenty books of the *Etymologiae* stand out primarily due to the fact that their author had demonstrated great enthusiasm in rewriting the ancient authors (Boethius, Hieronymus, Hyginus, Augustine, St. Gregory the Dialogist, Servius, Festus, Ulpian, and so on). Once he permitted himself to display independence, the primitivism of his thinking and lack of original ideas become clearly evident. Suffice it to mention his accusation that miracle workers caused hail, rain, drought, converting one animal into another, a human being into a wolf or another beast, or his claims that there existed flying lamas, men-demons, masks that devour children and are lovers of women. [...] Therefore, it is rather light-minded to characterize him as a «famous enlightener» and to assign to his *Etymologiae* the status of 'a treasure of knowledge from which subsequent generations derived all their scientific knowledge'».[3]

The second period in the development of international law thinking in the Middles Ages was marked by the emergence of the Holy Roman Empire, with secular authorities beginning to feel more confident during that period: «Rome, once again, became the center of the world, a Christian successor of the hereditary Rome».[4] Instead of the simple enumeration of international legal views expressed at those times, Hrabar focused his attention on painting a comprehensive picture of the way the actual international relations of that period (particularly between the Church and secular powers) had impacted the formation of specific international legal concepts.

At the initial period of the struggle against Churchdom for supremacy in Europe, feudal power sprang up within the Holy Roman Empire under which all the other, smaller rulers became vassals or subjects of the Emperor. The objective of this centralization, similar to the processes in the ancient Roman Empire, was to lay down the superiority of the secular (Imperial) power in Europe. A detailed study of the views by Pope Gregory IV, Saint Nicolas I, Gregory VII, Innocent III, and others led Hrabar to the conclusion about a stronger theoretical, scientific, and educational support possessed by the Church during that period (based on the philosophical framework of the Bible and of Antiquity).

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[1] *Patron Saint for the Internet*, Isidore of Seville [electronic resource] at the Catholicism.org site. See: http://catholicism.org /patron-saint-for-the-internet-isidore-of-seville.html.
[2] *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII–XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901), p. 14.
[3] *V. H. Butkevych*, «Походження терміну "міжнародне право"» [The Origin of the Term «International Law»], Український часопис міжнародного права [Ukrainian Bulletin of International Law], no. 1 (1994), p. 50.
[4] *V. E. Hrabar*, Esquisse d'une histoire literaire du droit international au moyen age du IV au XIII siecle. — Ibid. — p. 29.

Hrabar paid attention to extra-juridical sources which may testify to certain international legal views (and institutes). In addition to the secular and ecclesiastical areas of shaping international legal thought, Hrabar studied folk arts, folklore, songs, and poetic chronicles which contain allusions to the rules for sending and receiving embassies, attitudes to foreigners, territory, waging of warfare, and others. Based on this information, he concluded that «in all the songs of the epoch (such as the *Lay of Ludwig*, the *Lay of Hildebrandt,* the poem Ruodlieb, the Song of Rolland), we find a sufficient number of rules concerning international law».[1]

Among the secular doctrines, Hrabar singled out the ideas of the English student, theologian, and teacher, Alcuin of York (c. 735–804);[2] and Agobard, the Archbishop of Lyon (769/779 — 840), who, in his written communications with the European rulers, supported consistently the teachings of Alcuin about the advantages of peaceful inter-State relations («Enemies of peace», he wrote to Emperor Louis the Pious, «encourage the Emperor to go to war. They promise to serve God. But God commanded that we love our neighbors»);[3] and R. Hincmar (circa 806–883), who had done so much for the revival of the international legal ideas of St. Augustine.

The main events of the third medieval period of shaping international legal thought (from the end of the eleventh century to the end of the thirteenth century) that impacted its further evolution, as pointed out by Hrabar, are «the struggle between the Empire and the Pontificate, the Crusades, the renewal of Roman law studies, and, as a result of these studies, the emergence of canon law».[4] On the basis of his analysis of those historical factors, Hrabar offered a truly useful methodological approach to the investigation of the history of international law doctrines so as to identify its laws of societal development from events in international relations and specify its impact on the development of the latter.

Hrabar defined as key factors of interaction in international law of that period the «two system of States», — the «Imperial system» and the «Pontificate system»: «Prior to the second half of the eleventh century, the states of Western Christianity had no common center for their grouping. There was the Empire founded by Charlemagne and restructured by Otton the Great. In the second half of the eleventh century, particularly from the beginning of the Pontificate of Pope Gregory VII, the Holy See is one more center of a grouping of States ... The idea to create a counterweight to the power of the Empire through the creation of a system of States united in the fold of the Holy See had been promoted first by Hildebrand, the future Pope Gregory VII (1073–1085). Prior to his pontificate, only two countries had been the vassals of the Holy See: the Norman State in Southern Italy (since 1059) and the Kingdom of Aragon in Spain (since 1068).[5] Gregory VII officially proclaimed the supremacy of the Church (as the embodiment of the spiritual) over secular authorities (as the embodiment of the sinful); therefore, the formation of the international legal order is to be established on Christian foundations. Pursuant to the same objectives, he had been actively involved in diplomatic activities, engaging in negotiations of these

[1] *V. E. Hrabar*, Esquisse d'une histoire literaire du droit international au moyen age du IV au XIII siecle. — Ibid. — p. 36.
[2] Taking up specifically the international law component of the writings of Alcuin, V. Hrabar undertakes a study of another object of his academic interest, — the English school of international law.
[3] *V. E. Hrabar,* Esquisse d'une histoire literaire du droit international au moyen age du IV au XIII siecle. — Ibid. — p. 36.
[4] Ibid., p. 373.
[5] Ibid., pp. 373, 375.

matters the sovereigns of the countries in Eastern Europe, Scandinavia, England, and, naturally, Western Europe. He had also contacted to this end Iziaslav, the Prince of Kyivan Rus, with a proposal to kneel before Saint Peter's throne. The concept of Pope Gregory VII was to ensure the submission of European international life to the Papacy. His brilliant efforts, Hrabar pointed out, made certain that «the idea of Pope Gregory VII to turn secular States into the cities of God and submit them to the rule of the Church had reached its apogee under Pope Innocent III (1198–1216) [...] The States of the Imperial system had been included in the circle of States that were vassals of the Holy See».[1]

Ultimately, it was secular power that came out the strongest from the struggle of these two forces. This resulted in the establishment, as early as the stage of the «Westphalian system of international law», of a positive-law concept as the most authoritative concept of this law (with all its etatist components: the principle of sovereign equality and of the balance of forces as a basis of international legal order; the State as the principal subject of this law; and an international treaty as its key source, and so on).

In concluding his analysis of the evolution of medieval international legal thought, Hrabar took up the subject constituting one of his primary academic interests: the evolution of Roman law in the international law doctrines of the glossators and post-glossators: «The twentieth century contains a date of extreme significance for the history of international law. During that time, a new, purely legal source of international law was added to the Bible as its moral and religious source already in existence. This new source was Roman law».[2]

Hrabar promoted the idea that since that time the secular and ecclesiastical directions of shaping international legal doctrines have been proceeding their own separate ways. The school of glossators (and later other national schools of international law) embraced the ideas of Roman jurists, whereas canon law evolved on the basis of the Biblical commandments and their interpretations by the fathers of ecclesiastical thinking. The key moment in the development of the Christian international legal doctrine was the *Decretum Gratiani* issued c. 1140 AD. Hence, ever since the times of this Decree by Gratian («the founder of the science of canon law»),[3] «Roman law lost its significance as the legal source binding on the Church and preserved its force merely as a subsidiary source whose provisions had not been repealed by ecclesiastical legislation».[4] This Decree declared unquestionable the authority of natural law, even if it this ran counter to canon law («resolutions ecclesiastical and secular, if not compliant with natural law, should be removed»).[5]

Analyzing the Medieval period of international legal development, Hrabar turned to a chronicler of Fulda, who pointed out in 876 AD that when Charles the Bold

[1] *V. E. Hrabar,* Esquisse d'une histoire literaire du droit international au moyen age du IV au XIII siecle. — Ibid. — p. 377.
[2] Ibid., p. 393.
[3] *K. Christensen,* Gratian. The Treatise on Laws (Decretum DD. 1–20) with the Ordinary Gloss, Studies in Medieval and Early Modern Canon Law (Washington D.C.: The Catholic University of America Press, 1993), vol. 2, p. 2.
[4] *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII-XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901), pp. 96–97.
[5] *Corpus iuris canonici.* — Editio Lipsiensis secunda / post Aemilii Ludouici Richteri curas as librorum manu scriptorium et edutionis Romanae fidem recognouit et adnotatione critica instruxit Aemilius Friedberg. Pars prior. Decretum Magistri Gratiani. Ex officinal Bernhardi Tauchnitz. Lipsiae MDCCCLXXIX. — Concordia Discondartium Canonum. Ac Primum. De iure naturae et constitutionis. (I.D.IX).

attacked the lands of his brother Louis the German, the latter chose to act as follows: «[He] sent envoys to Charles with the words: why did you go to war against me, if it is commanded to an ancient (that is, Old Testament) nation not to commence hostilities, even against alien nations, until after they reject the peace offered to them?»[1] Based on this record, Hrabar drew the somewhat unilateral conclusion that the Bible had been the only source of international law.[2]

Let us not forget that this happened in the ninth century, when the differences between religion and international law had already been established. Ecclesiastical canons *(canones ecclesiastici)* began to be put together from the fourth century in view of the fact that secular law, including international law, failed to satisfy the Church entirely. Without denying the role of the Bible for the resolution of inter-State issues, one should not overestimate its role either: «In Decretum Gratiani, even a simple fact of Biblical or Ecclesiastical history as precedent per se, without identifying any motives, serves sometimes as a source of law».[3] However, Gratian systematized canon law and did not seek examples from secular international law. The codification of canon law (academic codification first by Ivo of Chartres, Gratian, and others, followed by official codification) had been undertaken, among other factors, because international law that distanced itself too much could not satisfy the Church.

Even prior to the next stage in the development of international legal doctrines based on Roman law, the Church had already formed views on certain institutes of this law which, in turn, assisted the practical functioning of the latter and their inclusion in domestic (intra-State) and international legal acts. Those were the law of international treaties, foreigners, ambassadorial law, mediation, arbitration, reprisals, the law of war (in particular just wars, prisoners of war and hostages, and the difference between naval warfare and land warfare).

Hrabar had proved that the definition of the Middle Ages as the «Dark Ages» in the spiritual development of humankind was a mistake. His principal evidentiary materials were the doctrines of glossators and post-glossators, the Italian school of law, especially the glosses of Azo of Bologna («first rate glossator») and Accursius («the first lawmaker of the Middle Ages»), the former for his attempts to identify the essence of territorial waters and bring the international legal views of Roman authors in line with early feudal perceptions, whereas the second for his attempts to reconcile differences between the ancient and the Roman points of view and the medieval points of view on the identification of subjects of international law.[4] Prior to Hrabar, international legal views of the glossators had been studied thoroughly by the German historical school of law, especially by C. F. von Savigny.[5] The activities of the post-glossators led Hrabar to the following conclusion: «International law as

[1] *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII–XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901), pp. 19–20.
[2] Ibid., p. 18.
[3] Ibid., p. 20.
[4] *V. E. Hrabar.* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII–XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901); *W. E. Butler, V. E. Hrabar,* «Profile of a Russian International Legal Historian», Grabar V. E. The History of International Law in Russia (1647–1917) (Oxford, 1990).
[5] *Fr. C. von Savigny,* Geschichte des Römischen Rechts im Mittelalter (Darmstadt, 1986).

a legal discipline owes its emergence to medieval jurists, post-glossators, and not to theologians, as commonly thought».[1]

The impact of the schools of glossators and post-glossators on the development of international law doctrines (on the basis of an interpretation of Roman law provisions) was broken down by Hrabar into respective stages. He singled out the writings of Azo of Bologna: «The jurist Azo, the end of whose literary activities coincides with the first quarter of the eighteenth century, outlined in the introduction to his description of Justinian's *Institutes* a picture of the apotheosis of the revived Roman law. This law, in his words, protects justice in the world; its bearers rule the world; they sit in the Supreme Court, meting out justice to tribes and nations. [...] Ever since the turn of the century (thirteenth century — O. B.), Roman law expands, and becomes a sort of general law that reigns supreme over tribal and nations law — in a way, it acts like international law».[2] The author emphasizes, however, that the schools of glossators and post-glossators constitute not only two stages in the development of international legal thinking, but also reflect the relevant sub-stages of international legal development: the glossators «sought to put Roman legal garments on the then existing social relations, taking no interest whether they are becoming to their body ... It seemed absolutely clear to them that in case of any misalignment between reality and (Roman) law, the former is to accede to the latter. In reality, though, everything was not as it seemed. Concealed under the Roman cover was the legal figure of a German barbarian. ... The job of the necessary readjustment was up to post-glossators or commentators, rather than to glossators. They accommodated Roman law to life as it was in their own time, although they did so at the expense of Roman law itself. Glossators would not dare attempt this sacrifice, although they did show the way. ... Roman law was to become law in force, and this objective could not be achieved other than by way of changes, corresponding to the medieval legal order, in the Roman law provisions themselves. Jurists had in their hands a weapon to wield: the interpretations of legal provisions; the glossators had used this weapon cautiously and sparingly, while commentators began to apply it with more courage».[3]

Hrabar did not say this directly, but one feels distinctly here a confirmation of the concept presented in his study on the original meaning of the term *jus gentium*. Its key provisions as applied to the Middle Ages come down to the fact that there exists, first, the supremacy of international law (its primacy follows over municipal law during certain epochs: «law that reigns supreme over tribal and nations' law»); second, its fluctuating character (the Roman *jus gentium* had gone through changes from the public law of nations to private, civil law of Rome, and also (as a consequence) from international to municipal law and *vice versa*). These same features of generality common to all nations would continue in international law in subsequent periods, facilitating its applicability to changing circumstances in the system of international relations in the future historical periods. Third, as may be concluded from the previous characteristics of international law according to Hrabar's concept,

[1] *V. E. Hrabar, E. M. Fabrikov,* Краткий очерк истории кафедры международного права Московского государственного университета им. М. В. Ломоносова [A Brief Essay on the History of the Department of International Law at Moscow State M. V. Lomonosov University], Труды юридического факультета [Scientific Works of the Law Department] (M.: MGU Publishing House, 1956), p. 200.
[2] *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII—XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901), pp. 22—23.
[3] Ibid., pp. 28—29.

the «relations» of international and municipal law had been different during history and, depending on the respective legal factors, one or the other system comes out on top and starts dominating the opposite system. Believing that international law originated earlier «in inter-clan relations of a pre-class society» which later, after the emergence of a State, diverges as international and municipal law impacting the similarity of the two systems,[1] Hrabar let readers see some continued laws of societal development in the mutual relations of these legal systems in the course of history. Therefore, the principles of the interrelationships of international and national law had been different (and sometimes even opposite), depending on the stage of their interaction.

Accordingly, one may identify the three principal laws of societal development regarding the inter-relationships of national and international law: (1) the prevalence of a regulatory role of national law during the period of the formation of States of a certain type (ancient, feudal, bourgeois, and so on); (2) equal interaction, mutual influence, and complementarity of both these legal systems at the stage of existence of developed States of an identical type and a stable system of their relations; and (3) the primary impact of international law in the final stage of the existence of States of the relevant type (or a «social structure», to use the Marxist terminology) and the emergence of States belonging to a subsequent historical type which applied this law for the purpose of establishing a new international and national legal order. In the recent period, ancient legal order States insist on the primacy of international obligations over national legal acts, although this is contrary to the law of newly-created States that strive to strengthen their national law and insist on its supremacy; this process results in a new stage in the development of interaction of both the systems.

This interaction is representative of the period in the second half of the Middle Ages. In particular, Hrabar saw this in the respective fluctuations of international legal doctrines, especially in borrowings and interpretations of the Roman law of nations: «Scientific studies of Roman law were discontinued, ... it proved impossible to find its traces in the period between the eighth and eleventh centuries, whereas the literary writings belonging to this period had been created in the eighth or in the eleventh century; ... Anyway, Roman law had not been studied scientifically then, but merely for practical purposes. Studies dedicated to the pre-Bologna literature of Roman law contain no data that one could use for the literary history of international law».[2]

The second half of the Middle Ages is already the period where international law based on Roman law was more in line with the international system in its transition to the classical (Westphalian) period, which would be entirely dominated by the Roman law of nations and by the positivist concept that was born in its depths (including interpretations offered by glossators and post-glossators).

One major achievement of the school of glossators, according to Hrabar, is the conversion of jurisprudence into a separate object to be studied and taught, and the creation of a new branch of humanities' thinking. Hrabar offered two factors account-

[1] *V. E. Hrabar*, «Первоначальное значение римского термина *jus gentium*» [The Original Meaning of the Roman Term *Jus Gentium*], Учёные записки Тартуского государственного университета [Scientific Notes of Tartu State University] (Tartu, 1964). — Issue 148. — p. 38.

[2] *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII–XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901), p. 25.

ing for the success of the school of glossators: (1) the absence of distinct delineation between private law and public law at that time and, accordingly, the need to turn to Roman law of nations, which not only introduces this clear-cut delineation but also is keenly aware of it; and (2) the impact by representatives of both these schools — as practicing lawyers, diplomats, and counselors of their governments, who applied the theory of Roman law to existing feudal practices.

In the opinion of Hrabar, the glossators had viewed international law and such law that «unites institutes created without any interference on the part of the State power».[1] The perception of international law at that period sustained certain changes according to the perception of the Roman law approaches: initially, glossators viewed this law as a combination of the components of the law of nations, civil and natural law. However, subsequently they take it up as the law of nations in the narrow sense; this law, in their interpretation, sheds its natural law characteristics and, as a result, a positivist view of this law was established in the sixteenth and seventeenth centuries.

In terms of the systematization of international law, «it is possible to find in the gloss the beginnings of many teachings about certain international law institutes, for instance, maritime, ambassadorial, private, and criminal law, as well as the law of war».[2] In the sphere of the law of war, «the role of glossators is not so much about the development of the law of war, but about the transfer and clarification of the views of Roman jurists on the issue at hand».[3] However, he pays primary attention to the institute of the status of a legal subject as the key institute for an understanding of international law of a certain epoch and, accordingly, the key object to be interpreted by glossators. The way that glossators and post-glossators tried to fit Roman law perceptions of the subject of law into their own legal order was the key factor for an understanding of their international law doctrine (as well as the primary achievement of these schools in the history of international legal doctrine): «Recognizing the existence of many States, independent and dependent, the glossators were to resolve the matter as to which norms these States should be governed by in their mutual relations and what sources of law were mandatory for them [...] In their doctrine, the glossators followed the steps of Roman jurists, embracing the three-component division of law that emerged in later jurisprudence into natural law, law of nations, and civil law».[4]

But the above objective of the glossators was not easy to achieve. Rome, both in the period of its heyday and its downfall, had recognized only independent States as subjects of international law. Yet in a new environment, urban communities, for example those in Italy, enjoyed such a broad autonomy that they used to enter into international legal relations among themselves (the twelfth century is known in the history of Italy as the «period of autonomies»).[5] In practical terms those were fully-fledged participants of international relations and actually strong subjects of international law. Glossators faced the task of bringing their real status and practical relations into accord with classical Roman international legal provisions existing

[1] *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII–XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901), p. 70.
[2] Ibid., p. 75.
[3] Ibid., p. 75.
[4] Ibid., p. 57.
[5] *A. P. Sereni,* The Italian Conception of International Law (New York: Columbia University Press, 1943), p. 3.

then and recognized both in doctrine and in practice: that only the Roman Empire and the States independent of the Empire were deemed to be subjects of international law that may enter into international treaties («By their status, medieval urban communities had been more like States than private-law unions; and their mutual relations had been rather of an international nature. The provisions of international law proved more suitable for the purpose of regulating these new relations and found respective application to those relations, although being in contrast to the legal perceptions of the unity of the Roman State»;[1] but it should be noted that these perceptions had long ceased to be in line with existing realities, and the Roman Empire itself no longer existed in its classical form).

The way out of this situation was found by Franciscus Accursius (1182–1260), who came up with the following decision: «Since no urban community in Italy ... recognizes now any ruler over itself, it constitutes a free people by itself, possessing State powers and holding an authority within a single nation which is identical to the authority of the Emperor exercised by him over all of his Empire».[2] On the whole, Hrabar held in high esteem the contributions of Accursius to the development of international law: «The publication of this work (*Gloss* by Accursius — O. B.) left a significant impact. Eventually, this collection became a desk manual for judges and brought to its author the fame of being the first lawmaker of Middle Ages».[3] However, contemporary scholars believe that those legal constructions offered by Accursius contradicted classical Roman international law.[4] But they probably fail to take into consideration the fact that international law, in an environment of global international changes, is capable of closing political «fissions» and bringing the system of international relations back into a state of stability. Glossators of the twelfth century laid the actual sovereignty of a State-like formation in the foundation of recognizing its international subject status.

For this reason, classical doctrine treated as somewhat questionable the statement by glossators and later by post-glossators that reflected the practice effective in the early Middle Ages and subsequently a stable medieval international law practice in accordance with which a State in theory and a State in the new practices of international relations do not coincide. Specifically, this relates to the thesis of Bartolo da Sassoferato (who, in the opinion of Hrabar, «deserved the fame of the greatest jurist of the Middle Ages»),[5] who said that urban communities «by right or in fact, do not recognize now any superior authority and are therefore a free people».[6]

In matters pertaining to the law of war, the aspect of international legal subject status or of international law status also had a significant part in the doctrine of glossators. Thus, developing the classification of international law subjects on the basis

[1] *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII–XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901), p. 56.
[2] Ibid., pp. 185–186.
[3] *V. E. Hrabar,* «Аккурсий» [Accursius], in I. E. Andrievskyi (ed.), *Энциклопедический словарь* [Encyclopedic Dictionary] (Saint Petersburg: F. Brokhaus and I. Efron, 1896), vol. 1, p. 293.
[4] *Yu. Ya. Baskin, D. I. Feldman,* История международного права [The History of International Law] (M.: International Relations, 1990), p. 86.
[5] *V. E. Hrabar,* «Бартоло» [Bartolo], in I. E. Andrievskyi (ed.), *Энциклопедический словарь* [Encyclopedic Dictionary] (Saint Petersburg: F. Brokhaus and I. Efron, 1896), vol. III, p. 112.
[6] *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII–XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901), p. 184.

of the principle of prohibiting «private wars», glossators, according to Hrabar, broke them down into four categories: (1) the Roman nation; (2) its enemies; (3) neither enemies nor friends (those with whom the Roman nation had no relations whatsoever); and (4) those that maintain friendly relations with the Empire on the basis of a treaty that may have been entered into following a war.[1] This classification of subjects of international law depending on their international status and on the principle of their peaceful or friendly relations, in the interpretation offered by Hrabar, reminded one of the mandala principle underlying the international law of the Indian region as described, in particular, in Arthashastra, according to which all subjects of international law are divided into three categories, depending on amicable or hostile relations among them (the closest neighbors — enemies; neighbor's neighbors — allies, and so on). The similarity of these concepts confirms the fact of the emergence of identical international law perceptions in different regions that proceed from the identical essence of international law regulation.

The result of activities of the school of glossators, in the opinion of Hrabar, was the ultimate confirmation of international law as a separate system in legal doctrine and the uptake of the first national schools of this law, to a great extent, due to their attitude to the Roman law element in international relations: «When, later on, national law in some countries took precedence over Roman law, this victory was limited to intra-State relations and never extended to foreign international relations. [...] This was the fate of Roman law and Roman law adherents in England. Roman (civil) law *(Civil Law)* in relations between Englishmen on English territory was secondary to customary (common) law of England *(Common Law)*, and adherents of Roman law *(Civilians)* became second to common law jurists *(Common Lawyers)*. But beyond the borders of England and in relations with foreigners, «Civil law» maintained its hold: legal relations emerging on these grounds remained, as before, within the competence of «Civilians». «Civil law» changed its status from the common law of the nation to that of international law, and Civilians became the first theoreticians of international law».[2] It is possible that these parallels with the fate of the Roman classical *jus gentium* had drawn Hrabar's attention to the English medieval school of international law.

In this context, it will be of interest to note the interpretation given by Hrabar to the term «civil law». Drawing parallels with the Roman Empire, he identified this term with the notion of «municipal law» (as opposed to international law or the law of nations). In his opinion, this term had denominated the entire body of domestic legal orders, public-law and private-law ones, but taking into account the fact that for the most part it was made up of private law, the subsequent European legal doctrines embraced this term to denote specifically the civil-law or the private-law branch. Genetically, this term denoted the common law of the Roman State, as opposed to the law of nations, and it is in this sense that it was preserved exceptionally in English law: «This way, dual civil law came into being on the territory of the Roman Empire: it was Roman law common to all the Empire and civil law in its own right *(jus civile generale, jus civile)*, particularly the law of specific territorial alliances, of

[1] *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII–XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901), p. 52.
[2] Ibid., p. 45.

certain parts of the Roman Empire, the so-called Statutory or Municipal law. English jurisprudence, with its very conservative nature, has preserved this terminology until today, still calling Roman law as Civil Law, and the law of each separate State union as Municipal Law. [...] Our legal language lacks a term to serve as designation of the sum total of the legal terms of each individual State, a term that accords with the notion of *«jus civile»* of Roman jurists and their medieval interpreters or with the notion of «municipal law» in English jurisprudence. The expression «civil law» is the literal translation of the term *«jus civile»,* but it is understood too narrowly in our times, not in its original meaning which combined both private and public legal relations, but merely in the sense of «private law».[1]

But most noticeable, as the predecessors of classical international legal doctrines, were the ideas of post-glossators regarding international law, which, in the opinion of Hrabar, were assisted by the circumstances of international life of that time: «To a student of international law, post-glossators are of special interest as contemporaries and witnesses of the new order in the international life of Europe which was coming into being and was intended to replace the medieval theocratic order in which the Pope of Rome and the Emperor had been the supreme rulers of a single Christian state of West European nations [...] It is in the works of the canonists of the thirteenth century and of legists-post-glossators that we find the first more or less consistent doctrines of individual institutes of international law of those times».[2] It is necessary to point out that here Hrabar is among the first students of the history of international legal doctrines of that period to emphasize the impact of a transition to the new international law as a result of changes in the international system: renunciation of the feudal (patrimonial or private-law) view on the status of subjects of international law, the theory of population in international law; the final prohibition against «private wars»; a decrease in the significance of the religious component and a transfer of the emphasis in the development of international legislation on to sovereign States; the transformation of the status of an international treaty (its establishment not as a contract but as a public-law source founded on the sovereign will of the parties); the shaping of the first branches, comprehensive institutes, and, as a result, of the system of international law.

These changes in the political life had found the fullest reflection in the doctrine of the post-glossaries Bartolus and of his student Baldus, to whom Hrabar therefore pays primary attention. The statist international-legal doctrine of the post-glossators, in particular that of Bartolus, had been worked out to such a perfect level that it would later underlie the theory of sovereignty of the Renaissance period.[3] For glossators, the interpretation of the status of subjects of international law of a State was the demand of the time, a response to the actual emergence and existence of such States on the territory of the former Roman Empire, whereas post-glossators identified the essence of this status as a subject of law through an analysis of its component parts: the territory, the population, and the authority holding power. Underlying the vision by Bartolus of the State (or of a community or of a town) as the subject of international law is the actual independence of this formation from the power of the Church.

[1] *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII–XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901), pp. 60–61.
[2] Ibid., pp. 128–129.
[3] Ibid., p. 169.

More fully, the idea of sovereignty as the basis of status as a subject of international law in the writings of Baldus is of interest to Hrabar because in this period lies the stage of the establishment of an almost classical vision of international law as inter-State law: «Bartolus could hold, although with some reservations, onto the fiction of the State unity of the Holy Roman Empire, whereas for Baldus and his contemporaries, this became untenable [...] It is no surprise therefore that the new State that was emerging drew the attention of lawyers. Feudal relations were generally alien to people brought up in the realm of Roman law. [...] Baldus established a number of restrictions on State power which followed from the requirements of natural law and the law of nations and was, in a beginning stage, a kind of a «declaration of human and civil rights».[1] Hrabar saw in the ideas of Baldus the first pre-Bodin concept of State sovereignty, which, unlike proclaimed by Jean Bodin, is not absolute, but limited by the requirements of the law of nations (in particular, by the principle pacta sunt servanda).

Hrabar put forward a suggestion that Baldus already had the idea to unite States on the basis of their cultural proximity, recognition of a single church (although Baldus did not yet hold a clear view on the conflict of the «two swords» concept, being «neither an extreme imperialist nor an extreme proponent of the Church. This idea was a correct reflection of the peace-making trend, with a preponderance of Church authority, which came into existence along with Charles IV acceding to the throne of the Emperor»,[2] which was thought to be the creation of the Spanish school of international law, especially that of F. Vittoria. Bartolus spoke of the existing international legal order as of the «Western Christian world, which broke up internally into independent States, still preserving, however, a certain religious and political integrity separating it from the rest of the world».[3] This already represented a doctrinal explanation of international law as the law of only a certain unity of nations having joint Roman-law roots and adhering to identical cultural values. Subsequently, this approach became the basis for interpretations of international law as the law of civilized nations.

Continuing this idea of Bartolus, particularly analyzing his position on the possible inclusion of non-European nations into international intercourse, Hrabar offered his own vision on international law as the law of «civilized nations»: «... with this, Bartolus terminated his clarifications of international relations of the Western Christian world to the nations of the Christian and non-Christian East. [...] But not because he had nothing to say about those nations, but merely because they were of no interest to Bartolus. [...] To an historian of international law, the attitude of the Roman Empire to other nations living beyond its borders is not of significant interest either, because the norms of modern international law emerged not in these, largely exceptional, relations, but in relations within the boundaries of the Empire; moreover, those that arose on the basis laid down by Roman law».[4] This led Hrabar

[1] *V. E. Hrabar,* Вопросы международного права в юридических консультациях Бальда [Issues of International Law in the Legal Consultations by Bald] (Petrohrad, 1917), pp. 5, 8.
[2] *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII–XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901), p. 180.
[3] Ibid., p. 192.
4 *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII–XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901), p. 193.

to the opinion, quite popular in his times, of international law as the «law of civilized nations». Hence, on the whole, he evaluated positively (at least not critically) the international-legal Eurocentrism: «Throughout the nineteenth century, the cultured States of Europe were engaged in nothing but destruction of the independent existence of a whole number of States possessing a less developed culture. One should hardly be sorry about this demise of a great number of States. [...] The situation of those countries and of their population was better under the new government than it had been under the previous government».[1] Hrabar's position came about under the influence of his studies of the Roman law of nations as a more advanced law and such law that created the foundation of European international law.

Analyzing the problem of substantiating the lawfulness of reprisals, which Bartolus had been dealing with, Hrabar drew a conclusion about the supremacy and stability of international law. In their attempts for several centuries to prohibit reprisals, European sovereigns had proved unable to bring these attempts to fruition in the absence of other effective means of recourse to legal remedies as to the rights violated, to ensure an efficient adjudication, and so on. Post-glossators had to reconcile the legal doctrines that generally rejected the legitimacy of reprisals with the realities of actual life. As such, having no support in Roman law, Bartolus found a way out by turning to the law of nations: «All Bartolus had to do was to prove that reprisals were permissible under the law of nations, and this would immediately remove all objections against reprisals as an institute running counter to the provisions of Roman civil law: what is permitted by the law of nations cannot be prohibited by the Roman law. [...] Where Roman provisions are not applicable, they are cancelled out and replaced with applicable ones that come from a higher source, — natural law and the law of nations».[2]

The core meaning of the principle of unswerving compliance with international commitments has its origin in the same authority of the law of nations.[3] This is already a manifestation of the sufficiently stable medieval system of international law and of international relations, which requires its doctrinal fixation and an interpretation of the need to abide by its foundations. For example, according to Bartolus, «treaties originate from the law of nations ... since the law of nations is not subject to changes».[4] Analyzing the views of post-glossators on the idea of compliance with international treaties, which is in itself a product of the ancient past, Hrabar compared them with the concept of Georg Jellinek regarding the «self-restriction» of nations in favor of the latter as a manifestation of the extreme formal and fictitiously etatist approach to international law.

All of the above, in the opinion of Hrabar, resulted in (1) recognition of international law as a separate legal system intended specifically to regulate international relations; (2) interpretation and perception of this law as public law; and (3) singling out international legal doctrines as a separate sphere of jurisprudence.

However, one conclusion made by Hrabar from his analysis of medieval international-law doctrines seems questionable. Thus, in his opinion, «early in the twelfth

1 *V. E. Hrabar,* Начало равенства государств в современном международном праве [The Origins of the Equality of States in Modern International Law] (Saint Petersburg, 1912), p. 34.
2 *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII—XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901), p. 230.
3 *V. E. Hrabar,* Начало равенства государств в современном международном праве [The Origins of the Equality of States in Modern International Law] (Saint Petersburg, 1912), pp. 17—26.
4 Ibid., p. 18.

century, we come across the first traces of turning to Roman law seeking to find an appropriate provision so as to regulate relations which will be identified subsequently as being international».[1] Such thoughts are characteristic of other scholars: «During the initial periods of its existence, a feudal society, by its form, seemed to represent a system of contractual relations between feudal lords of different levels whose lands (fiefdoms) were States within States. [...] Due to these peculiarities of the feudal order, it was often difficult to isolate private-law relations from public-law relations, and a private agreement from international treaty in its complete meaning».[2]

While agreeing entirely with Hrabar that, during the early Middle Ages, there prevailed in Europe a «feudal order of relations where public law was based on private law», one cannot ignore at the same time the genetic difference between these spheres of law, as well as the continual attempts by philosophers to delineate them (the calls to prohibit private wars in the writings of Ambrose, the Bishop of Milan, St. Augustine, and others; the concept of a public, sovereign ruler as the only real ruler of the country put forward in the doctrines of representatives of the medieval secular school of international legal doctrine; the shaping of the doctrines of territorial and private supremacy in the activities of the Popes of Rome and of other Church dignitaries, and so on). As demonstrated by an analysis of international treaties dating back to the period from the beginning of the previous millennium through the emergence of classical international law, if one comes across civil-law elements in the European region, these are merely of a formal nature.

The next historical stage in the shaping of international legal doctrine, which was of special academic interest to Hrabar, had been the period of the emergence and development of national schools of international law. In their shaping, he saw a significant role of undertaking the justification of the law of war, and its clarification as a component of the international-legal system: «In order to monitor compliance with the regulations and for the purpose of addressing all legal issues related to military service, the position of auditors — military lawyers had been established in the army. [...] They had taken up the first studies of the law of war in modern times (following the writings of medieval theologians and canonists). One may mention in this connection the Italian Pierino Belli, the auditor of the army of Emperor Charles V in Italy who acted later as the military advisor to Phillip II of Spain; and the general auditor of the Belgian troops of Phillip II, Baltasar Ayala, born in the Spanish Netherlands. Their works reflected the influence of the revived ancient literature: they build up the law of war on the basis of strictly legal statements and the stringent military practices of the Romans».[3]

However, Hrabar was more keenly interested in the medieval and modern English school of international law. Although, having said that, we need to mention that he deduces this also from a somewhat simplified tying it with addressing the issues pertaining to the law of war: «A war, changing significantly the relations between nations, which are customary to them in peaceful times, had drawn to it the attention of scholars long before and led them to isolate international law into a separate

[1] *V. E. Hrabar,* Римское право в истории международно-правовых учений. Элементы международно-правовых учений в трудах легистов XII–XIV вв. [Roman Law in the History of International Law Doctrines. Elements of International Legal Doctrines in the Works of Legists of the Twelfth to Fourteenth Centuries] (Juriew: Matissen publishing house, 1901), p. 234.
[2] *H. I. Tunkin* (ed.), Международное право [International Law] (M.: Legal Literature, 1994), p. 28.
[3] *V. E. Hrabar,* «Право войны» [War Law], in I. E. Andrievskyi (ed.), *Энциклопедический словарь* [Encyclopedic Dictionary] (Saint Petersburg: F. Brokhaus and I. Efron, 1896), vol. XXIVa., pp. 874–875.

branch of jurisprudence (Alberico Gentili at the end of the sixteenth century).[1] In fact, he devoted his doctoral thesis on the science of international law in pre-reformation England to the emergence and special features of this school. Despite the fact that the text of this study was reportedly lost during World War I, obviously parts were preserved in the form of a number of Hrabar's books published, among them works dealing with: John Wycliffe's views on international law, questions of State and international law in the Commentary of John Mair on the Sentences of Peter Lombard, the notion of natural and international law in English literature of the twelfth to sixteenth centuries, and reprisals in England under Edward II.[2]

Hrabar's desire to capture the least studied aspects of the history of international legal doctrines testifies to his interest in this subject. One aspect is the views of the medieval Scottish jurist and theologian, John Mair, on international law. Mair's international legal views had not been reflected in theory (including English international law theory). This philosopher had been considered primarily a proponent of theological and political ideas: «He dealt primarily ... with ecclesiastical questions of interrelations of the Pope and the General Council, and with political principles».[3] For the most part, the subject of research was his ideas regarding the political order (substantiation of a complete power of the ruler over his State and of relations between secular and ecclesiastical powers) and their comparison with the relevant ideas of Machiavelli. Among the international law experts, only Nys mentioned this medieval researcher.[4]

Hrabar devoted a major part of his study to the international law views of Mair. However, analyzing his views on State law, Hrabar focused on the concept of the supremacy of an ordered State (given to us by God) and of turmoil arising there following the sins committed by people, considering their banishment from Eden as punishment. This concept expressed by Mair with regard to ownership («Being uncorrupted, before the original sin, people had known no property. [...] Following the original sin, human nature in its baneful state gave birth to the need for serfs (slaves)»,[5] which had become deeply rooted in the history of international legal doctrine. The first manifestations were the ideas of the ancient Middle East mythology that the Gods had first created the world from chaos, then brought it to order and gave laws to the people; and only after that, as a result of the violations by the people of those laws, did there come wars and violence forbidden by the Gods, for which they are punishing humans. These ideas were elaborated by Saint Augustine

[1] *V. E. Hrabar,* «Право войны» [War Law], in I. E. Andrievskyi (ed.), *Энциклопедический словарь* [Encyclopedic Dictionary] (Saint Petersburg: F. Brokhaus and I. Efron, 1896), vol. XXIVa., p. 875.
[2] *K. O. Savchuk,* Міжнародно-правові погляди академіка В. Е. Грабаря: Монографія [International Law Views of Academician V. E. Hrabar: Monograph] (K.: V. M. Koretsky Institute of State and Law, National Academy of Sciences of Ukraine, 2003), p. 54; *W. E. Butler,* Владимир Эммануилович Грабарь (1865-1956). Библиографический очерк [Vladimir Emmanuilovich Grabar (1865–1956). Bibliographical Essay], В. Э. Грабарь. Материалы к истории литературы международного права в России (1647–1917) [Materials on the History of International Law Literature in Russia (1647–1917)] (M.: Zertsalo, Systema Harant, 2005), p. XXXVIII.
[3] *R. W. Carlyle, A. J. Carlyle,* History of Medieval Political Theory in the West (Edinburgh and London: Willam Blackwood & Sons Ltd., MCML, 1950), vol. VI (Political Theory from 1300 to 1600), pp. 247–249.
[4] *E. Nys'* «Introduction», in J. B. Scott (ed.) *The Classics of International Law* (Oxford, 1925); *F. De Vittoria,* De Indis et de lure Belli Relectiones / ed. by E. Nys (New York: Oceana Publications for Carnegie Institution, 1964), p. 20.
[5] *V. E. Hrabar,* «Питання державного й міжнародного права в Коментарях Джона Мера до *Сентенцій* Петра Ломбарда (До літературної історії міжнародного права середніх віків)» [Questions of State and International Law in the Commentary of John Mair on the *Sentences* of Peter Lombard (On a Literary History of International Law of the Middle Ages)], Записки соціально-економічного відділу [Annals of the Socio-Economic Section], Vol. V–VI (1927), p. 294.

regarding the hereditary responsibility of all mankind for the original sin committed by the first people.

Hrabar compared Mair's thoughts about the interrelationships of the church with the secular authorities to the ideas of legists and canonists, so as to identify his place as «in between the legists who sided with secular powers-that-be and the canonists, protectors of the ecclesiastical aspirations».[1]

Being a student of the history of the law of war, Hrabar paid more attention to the evolution of views in this sphere in the history of international legal doctrine at the cost of attention to ideas regarding the law of peace. Likewise, describing the ideas of Mair, he focused on his ideas regarding the prohibition of «private wars» («A private person is free to defend himself, but not to wage wars»), and a just war, his requirements for such wars being similar to the concept of Thomas Aquinas («it is a war initiated by a lawful authority on just grounds, having a truthful intention, which conducts it with proper moderation»).[2]

On the whole, all this work is merely a description of the thought of Mair, offering no critique, which is unusual for Hrabar. However, this may also be accounted for by the weakness of international legal views proper of Mair, who can hardly be characterized as an outstanding author in the history of international legal doctrine. Most likely, his position interests Hrabar because of the lack of information about this author. After all, once in a while, although not often, Hrabar expressed his opinion on the position of Mair. For instance, describing his requirements for a just war (specifically, that a just war should be declared by a just person), Hrabar noted: «There seems to be a gap here. The requirement applying to an individual (persona) also applies to the other person who declares war and to those persons who wage it, that is, to participants in the war. This requirement is put forward by all theologians and canonists of the Middle Ages who wrote about law of arms. This requirement is about the need for only laity to be involved in war, and that only they should be permitted to spill blood».[3] Elsewhere in the text, Hrabar indicated another gap in Mair's discourse on the right to capture property: since the allocation of spoils taken in war is regulated by customary international law, «Mair does not believe it is necessary to dwell in detail on such purely human laws».[4]

Analyzing the international legal views of English philosophers of the Middle Ages,[5] Hrabar, in fact, offered for the first time his analysis of the process of shaping of the English school of international law and of its peculiarities.

One can speak about the formation of a national school of international law if several criteria are already in place: (1) availability of the relevant scientific and educational facilities (academies, universities); (2) doctrines and concepts have been

[1] *V. E. Hrabar,* «Питання державного й міжнароднього права в Коментарях Джона Мера до *Сентенцій* Петра Ломбарда (До літературної історії міжнароднього права середніх віків)» [Questions of State and International Law in the Commentary of John Mair on the *Sentences* of Peter Lombard (On a Literary History of International Law of the Middle Ages)], Записки соціально-економічного відділу [Annals of the Socio-Economic Section], Vol. V–VI (1927), p. 296.
[2] Ibid., pp. 297, 300–301.
[3] *V. E. Hrabar,* «Питання державного й міжнародного права в Коментарях Джона Мера до *Сентенцій* Петра Ломбарда (До літературної історії міжнародного права середніх віків)» [Questions of State and International Law in the Commentary of John Mair on the *Sentences* of Peter Lombard (On a Literary History of International Law of the Middle Ages)], Записки соціально-економічного відділу [Annals of the Socio-Economic Section], Vol. V–VI (1927), pp. 301–302.
[4] Ibid., p. 307.
[5] *K. O. Savchuk,* Міжнародно-правові погляди академіка В. Е. Грабаря: Монографія [International Law Views of Academician V. E. Hrabar: Monograph] (K.: V. M. Koretsky Institute of State and Law, National Academy of Sciences of Ukraine, 2003), pp. 54–61.

developed which are of significance at least to an individual country if not to the world community; (3) availability of successors who continue to develop ideas of the founders of the school; and (4) the doctrines and concepts of the national school are to possess a uniformity of views and be characterized as having commonality and consistency of its principles and methodologies. Without naming them, but having deduced all the laws of societal development of the emergence of the Italian (since the twelfth century, that is, the activities of the school of glossators) and English medieval schools of international law, Hrabar was the first to begin studying on a systemic basis the history of international legal doctrine by national schools.

Hrabar identified Alberico Gentili as the most outstanding scholar of the English school of international law and compared his ideas to those of Hugo Grotius.[1] As for the latter, Hrabar pointed to his development of the system of international law and the significance of the concepts of positive and natural law for interpretations of the corresponding international law institutes. Emphasizing consistently in his works the idea that Grotius had not been the first to treat international law (pointing to the activities of Gentili before Grotius), Hrabar, nevertheless, gave Grotius his due in the formulation of the system of this law: «Prior to him, the authors, for instance Alberico Gentili, would write a treatise on individual components of this law, without bringing them all together, and, accordingly, they had never come up with the issue of a system».[2] However, Hrabar saw some underestimation of international law in the Grotian system, too (with its division into the war of war and peace): «This separation by Grotius had been of little use even for his times, whereas today it looks like pure anachronism; to say nothing of the fact that war is far from terminating the effect of the norms of peaceful times, since the legal provisions regulating it constitute only a minor part of the total ambit of international law».[3]

Holding in high esteem the role of Roman law in the development of international legal doctrine, Hrabar focused attention on its European manifestations, reaching back to the emergence of the early national schools in Italy and England and studying the positive law views of this law in the nineteenth century. Hrabar made a huge contribution to the development of the history of international legal doctrine as a distinct separate branch of the theory of this law. This applies to specific writings of the Hrabar in developing this subject-matter, his taking up the least studied aspects of this history, as well as the methodology proposed by him to study the history of international legal doctrine.

[1] *V. E. Hrabar,* «Гуго Гроций и Альберикс Джентили как представители двух направлений в науке международного права (Доклад к трехсотлетию со дня смерти Гуго Гроция)» [Hugo Grotius and Alberix Gentili as Representatives of the Two Directions in the History of International Law (Report Dedicated the 300th Anniversary of the Death of Huge Grotius], Известия Академии наук СССР [Bulletin of the USSR Academy of Sciences], no. 1 (1946), pp. 13–25.
[2] *V. E. Hrabar,* «Из истории систематики медународного права» [From the History of International Law Systematization], Советский ежегодник международного права [Soviet Yearbook of International Law] (M.: Nauka, 1963), p. 481.
[3] Ibid., p. 482.