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ANGLO–SCOTTISH RELATIONS, 1290–1513, AND THE BEGINNINGS OF INTERNATIONAL LAW

LORD SUMPTION*

Between 1290 and 1513, the kingdom of Scotland was almost continuously at war with England. The wars began with the attempts of the first three Edwards to conquer Scotland. But they continued long after those attempts had failed. The main reason for this was the involvement of Scotland as an ally of France in the bitter Anglo–French conflict known as the Hundred Years’ War. It is not often realised that the first hostilities of the Hundred Years’ War, in 1336, arose from the refusal of Edward III of England to comply with a French ultimatum to withdraw his armies from Scotland. Thereafter, Scottish raids into England were regularly co-ordinated with the French so as to coincide with English attacks on France. The situation was aggravated by the growth in the Scottish and English borderlands of a society increasingly dependent on war for its livelihood. This was a particularly significant factor in Scotland during the half-century from the 1370s to the 1420s when the Border was dominated by the Black Douglases.

The three-way conflict between England, France and Scotland gave rise to difficult questions of what we would now call international law. In the late Middle Ages, the basic rule of international law was the same for states as it was for natural persons, namely *pacta sunt servanda*. In the thirteenth century, this had been good enough for most purposes. The kings of England had bilateral treaties with both France and Scotland, which more or less kept the peace from the 1250s until the end of the century. But the system broke down in the 1290s, with the adoption by Edward I of England of a new and more aggressive approach to both of England’s neighbours, which persisted with brief intervals for the next two centuries. In Scotland’s case, the only period after 1290 when Anglo–Scottish relations were regulated by treaty was the four-year period from the conclusion of the treaty of Northampton in 1328 until Edward III tore it up in 1332. At other times, there were agreements for the ransoming of the two Scottish kings who fell into English hands. There were also local and temporary truces on the Border. But these were not treaties of peace. They were essentially modes of regulating a persistent state of war. In these circumstances, there was renewed interest in both countries in the principles governing the relations between states in the absence of agreement. In particular, two questions arose which

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were closely related. The first was what were the proper occasions for war; the second was what constituted a sovereign state entitled to be treated as such by other states.

My subject today is the early attempts to formulate answers to these questions. Bearing in mind the audience which I am addressing, my focus will be on Scotland and on English policy towards Scotland. But similar issues were provoked by wars in other parts of Europe. Britain has never been a legal island. And medieval Scotland did not exist in an intellectual vacuum. It was part of a European Christian community with a large measure of commonalty in its way of thinking about these matters. So, I make no apology for looking at the subject in a broader European context.

International law is a modern expression, but it is not a modern thing. It is as well, therefore, to start by saying something about what we mean when we speak of international law in the late Middle Ages. The traditional view is that the history of international law properly begins in the seventeenth century with the Peace of Westphalia and the writings of Hugo Grotius. The basis of this view is that international law is a discrete body of law, distinct from municipal law. It is the body of law specifically and only applicable to the relations between states. So, the orthodox view is that the study of international law properly begins with the modern conception of states as entities which are subject to a distinct corpus of rules. This approach is well represented by the relevant chapters in the *Oxford Handbook of the History of International Law*. They assert that little is known about the concept of the state as a subject of international law in the Middle Ages. As I shall try to demonstrate, this is very far from the truth. A great deal is known about the concept of the state as a subject of international law in the Middle Ages.

To some extent, the misunderstanding is due to the fact that medieval lawyers had a different and in some ways more complex conception of international law than their post-Westphalian successors. They acknowledged of course that, sovereigns being equal as between themselves, their relations could not be governed by any domestic system of law. They did not speak of international law as such. But they believed that there were principles independent of treaty, which could properly be called law and were binding on sovereigns. These principles were derived from two sources, which were not always very clearly distinguished. One was natural law, a body of principle which was not made by men but discoverable by human reason. It comprised rules of conduct thought to be so fundamental to rational beings that they should be regarded as binding on all persons, whether they were sovereigns or subjects. The second source was the law of nations, the *ius gentium*, a term adopted from Roman law but to which the Middle Ages attached a different meaning. The Romans had regarded the *ius gentium* as a branch of natural law. But medieval jurists tended to treat it as a man-made construct, often conventional rather than rational, which roughly corresponded to our own conception of customary international law. Its binding force was derived from historical experience, which suggested that it served the interests of states in general, and from state practice, which gradually hardened into binding custom.

This body of principle was not wholly distinct from the municipal law that governed the relations between individuals or between the individual and the state. Take for example the law of arms. This was a system of customary law which by the fourteenth century had attained a high degree of elaboration and a large measure

of uniformity across Europe. It was regarded as binding as between the armies of opposing sides in an international conflict. It was enforced not just by domestic courts but by distinct courts of chivalry, set up by sovereigns but staffed by experts on the law of arms and exercising international jurisdiction. The law of arms can fairly be regarded as a branch of international law. However, it was mainly concerned to confer rights and obligations on individual soldiers, not on states. Indeed, parts of it, such as the treatment of prisoners of war, were essentially contractual, albeit that in some respects freedom of contract was limited by custom. The king might assert his rights under the law of arms in his personal capacity, but the legal responsibility of the state was not engaged.

There was, however, one area in which international law was exclusively concerned with the relations between states, and that was the declaration and conduct of war. The concept of the just war was derived from the natural-law theories of the classical world. But it was considerably developed during the Middle Ages, mainly by theologians and canon lawyers. "Just war" theorists were broadly agreed on the essential criteria for a just war. It must be fought by a sovereign for a specific purpose, which must be objectively justified and pursued in good faith, not for some collateral object. Most of these criteria were far too general in their formulation and far too debatable in their application to operate as rules of law. They therefore had little influence beyond the world of scholars. But there was one important exception, and that was the criterion known to canonists as *auctoritas*. Only a sovereign could authorise a just war. This principle had enormous implications, not just for scholars but also for governments, judges and soldiers. It was the criterion by which public war was distinguished from mere criminal violence. As a result, *auctoritas* became for practical purposes *the* badge of the just war. In the eyes of soldiers and statesmen, a just war was a war fought by sovereign authority. The civilians, who were never happy with the vagueness of the theological criteria of justice, tended to agree. According to John of Legnano, "war is licit whenever it is sanctioned by legally constituted authority". His near-contemporary Bartolus of Sassoferrato also thought so. "Only he who has no superior can declare a just war."

Now, at this point one is bound to ask how much medieval rulers really cared about the legality of their wars. After all, as recently as 1956, an English Lord Chancellor could write to the prime minister to say that his proposed invasion of Egypt was completely contrary to international law, but not to worry much about that. Our Whiggish ideas about the progress of civilisation lead us to suppose that if that was the attitude of the mid-twentieth century, the Middle Ages must have been worse. But in fact arguments about the justice of their wars really mattered to belligerent powers in late medieval Europe. The lawfulness of England's quarrel with Scotland and France was no exception. It had important practical implications. It was a significant factor in England's relations with its allies and potential allies in Western Europe, and with the papacy. It had implications for other aspects of international law, such as the treatment of prisoners, the right to booty taken in warlike operations and the right to seize enemy cargoes at sea even in neutral ships. I shall return to some of these issues later. But the implications were not exclusively practical. The lawfulness of their wars mattered very much to the self-respect of the kings themselves. They were perfectly capable of casuistry and cynicism, but ultimately they really cared about the salvation of their immortal souls. These feelings were particularly strong

during the reigns of the morbidly guilt-ridden Henry IV and the primly self-righteous Henry V. Henry V circulated accounts of his diplomatic dealings with the French among the courts of Europe as evidence of the justice of his cause. He sent an official narrative of the Agincourt campaign to be distributed at the ecumenical council of the Church at Constance. On his deathbed, he exhausted his remaining strength by trying to persuade the men gathered round his bed that in the conduct of his wars, he had always pursued the way of justice.

In 1435, Sir John Fastolf, one of the principal English captains in France, wrote a famous memorandum about the diplomatic and military position of the English in France. This was not a propaganda piece. It was a confidential paper for submission to the English royal council. Fastolf argued for the more vigorous prosecution of the war with France, at a time when it seemed likely that generous peace terms would be available if only the council would compromise on its war aims. One of the concessions required would have been the abandonment of the English claim to the crown of France. This, said Fastolf, would be a catastrophe for England's standing in Europe. It would imply that the English had been fighting an unlawful war ever since Edward III had first laid claim to the crown of France a century before. It might be "said, noised and deemed in all Christian lands", he wrote, "that not Henry the King nor all his noble progenitors had nor have no right in the Crown of France, and that all their wars and conquest hath been but usurpation and tyranny". It was a remarkable statement. But Fastolf's was a widely held view, and in the event it was shared by the council. What was "said, noised and deemed in all Christian lands" mattered to them. It particularly mattered that their wars should be thought of as lawful, and not as usurpation and tyranny.

Contemporaries had the same difficulty in formulating the relevant principles of the law of nations as modern historians do, namely the absence of any coherent body of legal materials. Of the various sources of international law that would be recognised today, most either did not exist at all in the Middle Ages, or had a much more limited place than they do now. Treaties were all bilateral. They were not normative. Natural law, although in principle regarded as binding, was commonly treated as a branch of moral philosophy and presented at too high a level of generality to have much impact on the conduct of international disputes. In the "Great Cause" tried before Edward I of England in the 1290s to determine the succession to the throne of Scotland, there was a good deal of argument about which law should apply. Robert Bruce argued that natural law supported the claim of the closest male relative, namely himself, and should be applied in preference to the law ordinarily governing the inheritance of property, which was based on primogeniture. This, he said, was because in determining the succession to thrones, it was necessary to apply a system of law that was binding on sovereigns, and not one made exclusively for subjects. It is an interesting and early resort to international law in a major legal dispute. But it led nowhere. It was received with scorn by his chief rival and was rejected by the auditors.

Today, the decisions of international tribunals are a major source of law. But in the fourteenth and fifteenth centuries there was no authoritative tribunal by which international law could be defined or enforced. The papacy asserted jurisdiction to pronounce upon the law of nations and enforce it against kings. But the papacy was a declining force. Its claims were only intermittently recognised before 1300, and

never afterwards. In 1296, Pope Boniface VIII summoned the kings of France and England to send their proctors before him to resolve the latest Anglo-French war. Both rulers refused to comply. Two years later, they did agree to submit the dispute to him, but only as arbitrator and not as judge, and only in his private capacity, not as pope. His award, when it appeared, proposed a compromise solution which was ignored by both sides.

In the absence of normative treaties and authoritative tribunals, how did men know what international law was? How do we know, after an interval of six centuries? The answer is that the main source was state practice. Of all the traditional sources of international law, state practice is the most difficult to use. It depends on the study of wars and negotiations, on a search for consensus in a mass of individually minor political events. The problem about the study of the history of international law is that political and military historians have shown little interest in it, while legal historians have tended to concentrate on contemporary textbooks and treatises, of which there were very few in this period.

In the late Middle Ages, the main guides through the minefield of principles governing international relations were learned men. One category of learned men in particular dominated the field, namely the practitioners of civil and canon law, doctors *in utroque jure*, who were increasingly in demand as sources of specialist advice to kings and nobles on the law of nations. Neither civil nor canon law directly answered the questions on which specialist advice was called for. But their practitioners enjoyed great prestige. The civil law had been the law of the last empire to embrace most of Europe, and canon law was the law of the one truly international organisation of medieval Europe, namely the Church. The last two centuries of the Middle Ages was the period in which the civilians and canonists, and particularly the civilians, reached the height of their fame and authority. Some of them acquired great wealth and power, reaching high positions in Church and state. Their opinions on international issues were canvassed by rulers and subjects alike. Edward I consulted the law faculty of Paris, and probably other European universities, about the Scottish succession at the end of the thirteenth century. In the 1370s, the small town of Millau, in the French province of Rouergue, faced with conflicting calls for its allegiance from England and France, sent agents to obtain advice from fourteen of the most celebrated lawyers of the University of Bologna, then the premier law faculty in Europe. Henry IV of England consulted the University of Oxford in 1400 about his obligations under the treaties of Brétigny and Paris. When their advice was unwelcome, he did what many difficult clients do. He changed his lawyer, and turned to the eccentric Welsh canonist Adam of Usk. Eccentric Adam may have been, but he seems to have given exactly the same answers.

As international law assumed growing practical importance, textbooks began to appear which responded to the needs of diplomats and soldiers. These too were usually the work of the civilians. The most useful textbook on the law of nations emerged relatively late in the day. This was the work of John of Legnano, one of the professors of Bologna consulted by the town of Millau. The first edition of his treatise *De Bello* (On War) appeared in 1360. This work discussed not just the lawful occasions for war, but also such matters as wager of battle, the status of prisoners, truces and reprisals. John of Legnano's discussion of the practical problems addressed by the laws of war was illustrated not just with references to the codes of canon and

civil law, but also with examples and historical incidents. The *De Bello* became one of the most widely read treatises on the subject in Europe for more than a century after his death. Although the original Latin text was probably read only by specialists, it achieved a much wider fame as a result of the plagiarisms of contemporary authors writing in French. Two of these plagiarists in particular had a large lay readership not just in France but throughout Western Europe. One was Honoré Bonet, a Provençal canonist who later settled in France and was retained as an adviser by the government of King Charles VI. He wrote, probably in the 1390s, a treatise called the *Tree of Battles*. The other was the prolific French woman of letters Christine de Pisan, whose *Book of Feats of Arms and Chivalry*, written in about 1410, was probably the most widely read work of its kind. These books were well known in both England and Scotland. Indeed, in 1456, long before the *Tree of Battles* was ever translated into English, it was translated into Scots at the request of the Chancellor of Scotland, William Sinclair, Earl of Orkney. The translator was Sir Gilbert Hay, a remarkable figure who began his career as a Scottish soldier of fortune in the armies of Charles VII of France before becoming a priest and embarking on the study of civil law.

Increasingly, European rulers employed their own specialists. The English government was well known for its patronage of civilians. Some of the lawyers on the diplomatic side of the English chancery rose to positions of great influence: Edward I's diplomatic secretary, Philip Martel; Walter Stapledon, who performed the same office for Edward II; Richard II's Keeper of the Privy Seal, Walter Skirlaw; Henry V's confidential clerk, Philip Morgan; and Henry VI's diplomatic secretary, Thomas Beckington. All of these men were civil lawyers, and all of them were retained mainly to deal with the foreign affairs.

The Scottish kings began later, but by the end of the fourteenth century they were drawing on much the same kinds of specialised legal expertise as their English adversaries. The wars with England made it difficult for Scots to study at English universities. The breach was completed when the two countries supported different popes during the great schism. As a result, almost all Scottish civilians in this period were trained on the continent. A fair number of them returned to Scotland to find employment in the service of the Scottish kings. They were not only experts in their subject, but also had some experience of foreign countries. They had travelled more widely than most Scots of their time and must have acquired more languages. They represented a cosmopolitan element in Scottish life which could be found nowhere else, except perhaps among a handful of noblemen.

The seminal figure was Walter Wardlaw, who became bishop of Glasgow and eventually a cardinal of the Avignon papacy. Wardlaw spent much of his adult life as a scholar and teacher in the arts faculty of the University of Paris. But he also served as David II's diplomatic secretary for much of the 1360s; and, although the term is an anachronism, he was virtually foreign minister of Scotland during those years. Wardlaw was not a lawyer. But he was an important patron of lawyers hoping for a career in royal service. His protégés included influential civil lawyers who appear regularly in the Scottish kings' embassies to England, France and the papal court in the next generation. Let me take just one example. Duncan Petit, Bachelor of Civil Laws, was an obscure man but for that very reason a fairly typical one. Petit must have been born in about 1340. He came from Ayrshire, and is first heard of in the early 1360s as a clerk in the royal household, studying civil law in England,

probably at Oxford. In the late 1360s, he returned to Scotland without taking a degree and went back into royal service in the audit office. In 1369, he succeeded Walter Wardlaw as royal secretary, a post which he retained until David II's death in 1371. Petit then returned to his studies, this time in Paris and probably also in Orléans, emerging at the end of the decade as a bachelor of canon and civil law. The Scottish king certainly contributed to the cost of his studies in England and probably also in France. In about 1379, Petit returned to Scotland and immediately went into the service of Robert II. He rapidly recovered his old position as royal secretary, and retained it until the king's death in 1390. For much of this period, he was mainly concerned with Scotland's foreign relations. He conducted at least two missions to the papal court in Avignon. He negotiated with John of Gaunt about the enforcement of the truce on the Border. He served in embassies to Westminster. He handled the discussions with the French army which arrived to support the Scottish war effort in 1385. Even after he had lost his position as royal secretary, he continued to be employed in important diplomatic business on behalf of Scotland.

There were many men whose careers were not unlike Petit's. John Peebles had a doctorate of Civil Laws, almost certainly gained at Orléans. Chancellor of Scotland for most of the reign of Robert II, he was regularly employed as an ambassador throughout that time. Henry Wardlaw, a nephew of the great Walter, secretary of the Duke of Albany, had spent two years at Orléans and was heavily involved in Scotland's relations with France and Avignon. Walter Trayl, later bishop of St Andrews, said by the poet Wyntoun to be "wise in council and cunning in government", represented Scotland at the diplomatic conference at Amiens in 1392. He was a Doctor in Canon and Civil Law, trained in Paris and Orléans. The classic *cursus honorum* of the ambitious young Scottish civil servant of the time involved a period of employment as a royal clerk, followed by study abroad, sometimes with the king's financial support, and then a return to royal service in Scotland. Their training would typically involve a degree in arts at Paris, followed by the study of canon law at Paris and civil law at Orléans. Orléans was a particularly important centre for Scottish students abroad. In the fourteenth and fifteenth centuries, it was one of the great European centres of civilian studies, ranking second only to Bologna. The Scots had their own national organisation at Orléans, many of whose members were destined for a career in royal service in Scotland. The links between law and war were always significant. I have already mentioned Sir Gilbert Hay, who moved from one profession to the other. A Scottish college at Orléans is said to have been founded in the 1430s with money left for the purpose by John Stuart of Darnley, constable of the Scottish army in France and one of the great Scottish captains of the latter part of the Hundred Years' War.

The mere fact that the kings of England and Scotland, like those of France, employed so many civilians as diplomatic advisers and agents suggests that they regarded law as a significant element in their international relations. The English were famous for the bookishness of their diplomatic methods. At conferences, they behaved like advocates appealing to authority rather than politicians bargaining for advantage. They arrived superbly briefed with historical facts, treaties and texts of learning and authority. They assembled veritable encyclopaedias of diplomatic documents, forms and precedents, bound up in what a hostile source called "beautiful and important-looking books". According to the same source, they would ostentatiously consult these

at meetings, like barristers pretending to hold the vital document in their hands as they cross-examine a recalcitrant witness.

A good example of the technique is provided by the conference between the English and Scottish wardens of the march at Kelso in October 1401. This was a routine meeting, which is unusual only in being more fully recorded than any similar occasion. The English spokesman opened with a long disquisition asserting that the kings of Scotland had been bound to do homage to the kings of England from time immemorial. When challenged by the Scots, he instructed a clerk to read out lengthy extracts from “chronicles and ancient writings”. These amounted to a tendentious account of Anglo–Scottish relations going back to the times of Eli, the Prophet Samuel and Brutus the Trojan. When he had finished, the spokesman declared that the effect of all this was that the rights of the English king over Scotland were “fully established in law”. He proceeded to cite laws and decretals said to bear this out, and called on John of Merton, a Scottish canonist standing among the Scottish delegation, to back him up. John remained prudently silent. One might wonder why the English went to all this trouble to assert with such a wealth of learning their king’s claim to the overlordship of Scotland. They cannot possibly have hoped to persuade the Scots. The English claims were not even on the meeting’s agenda. It had been called in order to renew the current truce on the Border, which was about to expire. It was far from clear that even that would be achieved. The Scots had raised their army, which was already drawn up on the banks of the Tweed waiting for hostilities to open. So, what were the English up to?

I think that what they were up to can best be understood by looking at the legal issues raised by the Anglo–Scottish wars. The main one was Scotland’s identity as a sovereign state, a subject as we would put it today of rights and liabilities in international law. The English contended that the king of Scotland was not a sovereign, but a feudal subordinate of the king of England. By 1401, this was hardly a realistic political position. Nonetheless, the English insisted on it even on the most unpromising diplomatic occasions, because only a state could wage war lawfully. They wished to deny the Scots the status of lawful belligerents.

Let me give some examples of the practical implications of the apparently academic question of Scotland’s statehood. From the beginning to the end of the Hundred Years’ War, the English would never allow Scottish participation in their diplomatic conferences with the French. The Scots were allies of the French, who had bound themselves not to make peace without them. Diplomatic practice would ordinarily require their inclusion in any negotiations with the English. Scottish diplomatic agents were sometimes present at these conferences, behind the curtain so to speak. But the English stuck firmly to their line that Anglo–Scottish relations were not a proper matter for international agreement. Their dealings with the Scots were an internal issue, not governed by international law and not a legitimate concern of the French. The issue was acrimoniously debated with the French representatives at the beginning of 1389. The English and the French were negotiating the truce of Leulinghem, which brought about the longest pause in the fighting of the whole of the Hundred Years’ War. The French insisted that the Scots would have to be represented. The English, who were unwilling to negotiate against the combined diplomatic forces of France and Scotland, refused point blank. As the English spokesman Walter Skirlaw put it at the conference, the Scots were “such close

neighbours of ours that we can visit them at any time we please without getting our feet wet, as they can us". The ultimate outcome was that the French gave way. They made a separate peace with England, and ultimately bullied the Scots into accepting it as *fait accompli*.

Let me turn to a second illustration of the practical implications of Scottish statehood, or lack of it. It concerns the treatment of prisoners of war. In principle, a prisoner was entitled to ransom himself for a reasonable sum, roughly related to his capacity to pay. In theory, the rights of both the prisoner and his captor were conditional on his having been captured in a lawful war. Captors were usually not greatly fussed about this. All they wanted was the money. But it was sometimes a matter of great moment to the king. Successive English kings declined to recognise the right of Scottish prisoners to ransom themselves, in circumstances where they would readily have accorded that right to French ones. When the army of David II of Scotland was defeated at the battle of Neville's Cross near Durham in 1346, there was a large haul of Scottish prisoners. Edward III had two of the most prominent prisoners tried for treason, because they had done homage to him in the brief period a decade earlier when he had occupied most of southern Scotland. One of them, the Earl of Menteith, was executed. He had been caught fighting in a war which according to English doctrine was not a lawful war but a rebellion. The rest of the prisoners were ordered to be held indefinitely in English prisons. This caused much ill-feeling among their English captors, who regarded their prisoners as marketable assets. But Henry IV behaved in exactly the same way after the battle of Humbleton Hill in 1402, when the prisoners included the Earl of Douglas, Murdoch Fife eldest son of the Duke of Albany, Governor of Scotland, and many of the leading noblemen of Scotland. There was also a group of French knights who had been sent by their government to support the Scottish campaign. The French knights were allowed to ransom themselves, but the Scots were not. They were ordered to be detained indefinitely at the king's pleasure.

Perhaps the most striking example of the implications of *auctoritas* (or lack of it) occurred in the next two reigns. Between 1419 and 1429, a large Scottish army operated in France in support of the Dauphin Charles of Touraine, later King Charles VII. At the time, the Scottish king, James I, was a prisoner in England. In 1419, Henry V entered into an alliance with the captive king which was intended to lead to his release. The terms were that James should use his authority as king of Scotland to put an end to the operations of the Scottish army in France. James performed the role appointed for him. He accompanied an English army to France. He issued orders requiring the Scots fighting for the Dauphin to lay down their arms. The consequence was that if they declined to obey, they could not be treated as lawful combatants even on the footing that James was a sovereign. After some hesitation and with considerable misgivings, the Scottish commanders in France declined to recognise their king's authority and persisted in the Dauphin's service. The result was that Scottish prisoners who fell into the hands of the English were liable to be treated as brigands and denied the protection of the law of arms. When garrisoned towns and castles surrendered to the English on terms, the terms routinely excluded Scots on the same footing as renegade English, Welsh or Irish. When Melun surrendered to Henry V in November 1420, twenty Scots found serving in the garrison were hanged. At Cravant, where the Scottish army in France was defeated by the Duke

of Bedford in 1423, at least twenty Scottish prisoners would have met the same fate if the Dauphin had not offered a particularly large sum for their release.

The principle that only a sovereign state could wage lawful war gave rise to another major issue. It is exemplified by the attempt of the English to use James I of Scotland as a weapon against his own people. The question was this. Who or what embodied the state internationally? What institutions were to be recognised by other states as performing that function? Until about forty years ago, states recognised not just other states but also governments. In the twelfth and thirteenth centuries, few people conceived that there could be any difference. In a monarchy, the king embodied the state in his own person. Treaties or acts of homage were personal obligations of the monarch who put his seal to them. But the late Middle Ages was a time of transition, from a highly personalised view of identity of the state to a more corporate conception, from the idea of a sovereign to that of a sovereign state.

There was a telling moment in this process at the opening of the fifteenth century. When, in 1399, Henry IV overthrew and murdered Richard II, a number of European countries at first declined to recognise him as king. One of them was France. This posed a dilemma for both countries. At that time, relations between them were governed by the treaty of Paris of 1396, which imposed a twenty-eight-year truce on the belligerents. The treaty of Paris had been agreed on the English side by the deposed Richard II. According to the traditional view, the treaty fell away with Richard's death, unless his successor agreed to be bound by it. The ordinary practice would have been to despatch an embassy to agree the reinstatement of all the treaties and obligations of the previous reign. But the French could not do this without recognising Henry IV as the new king. In 1400, the English suggested a way out of this dilemma. Treaties, they said "bound not just the kings but their kingdoms also". As a matter of law, this was a bold claim. But it was convenient for both states to accept it because neither of them at that stage wished to resume the war. These exchanges marked a conception of the state which came eventually to be almost universally accepted, as practice hardened into law.

The identity of the Scottish state became a major issue concerning England, Scotland and France during the Hundred Years' War. Much of the diplomatic effort of Scottish governments throughout the Anglo-Scottish wars was directed to obtaining international recognition of their existence as an autonomous state with international rights. They naturally denied the English claims to the homage of their kings. But, more fundamentally, they refused to accept that the identity of Scotland as a state equal in law to England could depend on whatever personal arrangements their king might make with the king of England. The Declaration of Arbroath was one of the most celebrated patriotic statements of the late Middle Ages. It was addressed not to the English but to the papacy. It was a direct response to the refusal of two successive popes, Clement V and John XXII, to recognise Robert Bruce as king of Scotland. The lords who subscribed it asserted that if any king of Scotland were to accept the English claims, he was likely to be replaced by another who would not. The Declaration of Arbroath is not couched as a statement of law. But it is an unmistakable assertion, on the part of the thirty-nine Scottish noblemen who put their seals to it, of a collective Scottish national existence, independent of the identity or status of its king, which a supranational body like the papacy ought to recognise.

The issue arose in acute form in Scotland during the reigns of David II and James I, both of whom passed long periods as prisoners in England. In order to obtain their release, both of them were prepared to make major political concessions to their captors which were rejected by the political community in Scotland. David II was captured at the battle of Neville's Cross in 1346 while leading an invasion of the north of England, and was carried off as a prisoner-of-war to London. In 1351, the Scottish Parliament rejected a draft treaty which had been agreed by the king and his Scottish councillors. It would have had the effect of transferring the succession of the childless David II to one of the English king's younger sons, probably John of Gaunt. In the 1360s, an attempt was made to revive this project, but it was thrown out by the Scottish Parliament like the earlier version. In both cases, the English kings found themselves forced to deal with the Scots corporately, and not just with their king. I have already referred to the case of James I, in connection with the English attempt to use him as a legal weapon against the Scots fighting in France. But perhaps the most interesting point to be made about this attempt is that it failed. The Scottish decision to recognise the Dauphin as the sovereign authority in France and to make a military alliance with him was taken by the Governor of Scotland, the Duke of Albany, and the general council of the realm, essentially a council of the nobility with some representation from the towns. In 1424, a second Scottish army was sent to France in the teeth of James I's opposition. In spite of their alliance with King James, the English were ultimately forced to deal with the Dukes of Albany, father and son, and the general council.

Very similar questions had arisen in France. In 1356, John II of France was taken prisoner by the English in the closing moments of the battle of Poitiers. Under the treaty of Bretigny of 1360, John II eventually agreed to detach about a third of his realm and cede it to Edward III of England in full sovereignty. According to John of Legnano and the other civilians of Bologna consulted by the town of Millau in 1370, he was not entitled to do this. The obstacle was not French domestic law but the law of nations as John of Legnano conceived it to be. France had an existence as an entity in international law, which was distinct from its king. The relationship between a sovereign and the state which he ruled was such that he was not entitled to abandon part of his sovereignty. The same issues arose in relation to the treaty made between Henry V and Charles VI at Troyes in 1420. The treaty transferred the succession to the French throne to the English dynasty. It was agreed by Charles VI and by an Estates-General representing about a third of France, but was repudiated by the other two thirds. At the Congress of Arras in 1435, perhaps the most important international conference of the fifteenth century, there were lengthy discussions between the civil lawyers about whether a king had the right to alter the succession to the crown of a whole nation. The consensus was that he did not. In all of these cases, national communities were asserting a right to legal existence as sovereign states simply as national communities, and irrespective of the arrangements that their monarchs might make in their own interest.

In one sense, these events can be regarded as chapters in the internal constitutional history of Scotland and France. That was how Grotius analysed very similar problems two centuries later in Book I of *De Jure Belli ac Pacis*. He regarded it as a question of agency. Governments dealing with a king, he observed, were obliged to accept that his constitutional powers might be limited under domestic law. This was

nothing to do with the law of nations. In the more developed constitutional world of seventeenth-century Europe, it made some sense to analyse the question in this way. But, in the late Middle Ages, the issue was more fundamental. The question was not who were the authorised agents of the Scottish state or even what were their constitutional powers. The question was: what was the Scottish state? What was the Scottish government? And was it capable of authorising a lawful war?

In a short lecture, it would hardly be possible to deal with the whole range of issues covered by medieval ideas about the law of nations. I have dealt only tangentially with prisoners-of-war, and not at all with the immunity of ambassadors or the law of reprisal or the enforcement of truces, all important subjects which regularly engaged the attention of civil lawyers working in the English and Scottish chanceries. The identity of the state and the justification for war were not therefore the only issues. But they were the most important ones. The debates on these issues in France are well known. I hope that I have persuaded you that, although Anglo-Scottish relations are not as well recorded, the issue was just as important in Edinburgh and Perth as it was in Paris and Poitiers.