

Expanding Histories of International Law

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I.

Much of the recent surge of interest in the history of international law has been fed by postcolonial attitudes in the legal academy. In the footsteps of Antony Anghie's *Sovereignty, Imperialism and International Law*,¹ new works have examined international law's role in facilitating or reforming the structures of Western rule in the colonies or in the global south before and after formal colonialism. Some of these have focused on the 19th century uses of legal techniques such as extraterritoriality or arbitration to guarantee the predominance of Western—European or American—interests in the Middle East, in Africa, or Latin America.² Early 20th century international institutions—the League of Nations, commodity agreements, aspects of multilateral treaty-making—have been examined with the view to understanding their role in the perpetuation of the global preponderance of the West. Other studies have focused on the struggles of the third world in the decolonization period—the formation and work of the 'G-77' in the aftermath of the Bandung Conference (1955) and the rise and fall of the 'New International Economic Order' in the 1970s and 1980s.³ The history of human rights, a real cottage industry nowadays, has likewise attracted postcolonial examinations of the role of subjective rights in the consolidation of Western economic or ideological hegemony.⁴

Such studies differ in many ways from older histories of the field that were either more neutral in conception or associated the growth of international law with peace and enlightenment. The first professional histories of the field, such as the works by

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1 (CUP 2003).

2 For example, Turan Kyaogly, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (CUP 2010); Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (CUP 2013); Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (CUP 2014); Umut Özsü, *Formalizing Displacement: International Law and Population Transfers* (OUP 2015).

3 See, for example, Sundhaya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011); Luis Eslava, Michael Fakhri, and Vasuki Nesiah (eds), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (CUP 2016) (forthcoming).

4 For example, José-Maria Barreto, *Human Rights from a Third World Perspective: Critique, History and International Law* (Cambridge Scholars' Publishing 2013).

the Belgian Ernst Nys or the Franco-German Robert Redslob at the end of the 19th and beginning of the 20th century presented the law of nations in its many permutations as an instrument of progressive humanitarianism, international solidarity, and lawfulness in the conduct of international relations.⁵ The natural law tradition propounded by the Spanish scholastics in the 16th century and the works of the Dutch Protestant Hugo Grotius in the 17th or Emer de Vattel from Neuchatel in the 18th century was presented as a voice of justice and reason in a violent world. Their works were treated with great respect, if not reverence, as representatives of a rationalist universalism opposed to Machiavellian statecraft and the egoism of sovereign statehood.⁶ Postcolonial histories have challenged these normative commitments. International law, they suggest, has not been an invariably beneficial voice of reason and humanity. On the contrary, it has contributed, sometimes decisively, to the rise and expansion of European global hegemony and remains still responsible for much of the inequality of the world.

The new studies agree with older ones in producing a sharp contrast between the 'Westphalian' political system that consecrated formal sovereignty as the centre of international relations and the broad, universalist ethos of international law embedded in legal and political theories that have sought to bring separate States under a single structure of government. For better or for worse, international law was a law of (European) statehood, and the task of the lawyers was to tame those states and make their leaders understand that they could best attain their objectives through peaceful collaboration. In this conception, the history of the law of nations was both the history of sovereign statehood and the history of universal principles that should govern states and lead into some kind of universal community beyond. Past jurists could then be classed as more or less 'realist' or 'idealist' by reference to the degree to which they emphasised either sovereignty or principles. Towards the middle of the 20th century, a few ultra-realist histories prefigured the postcolonial narratives by associating international law simply with (imperial) power and its history with the succession of global imperial designs.⁷ But the narrative of universal progress still formed the professional mainstay, with human rights as the crowning achievement of legal modernity. Postcolonial studies have largely preserved the distinction between more and less state-centric views of the law of nations but see them point in the same direction. As the developing world was finally attaining sovereign statehood in the 1960s and 1970s, the centre of the law was well under way moving to the 'universal' principles of human rights, rule of law, development, and free trade that enabled constant intervention by global institutions predominated by the West.⁸

Histories of international law, traditional as well as postcolonial, have normally taken for granted that they are about the history of the 'Westphalia system'—the international effects of sovereign statehood (not necessarily connected to 1648) and

5 Ernest Nys, *Les origines du droit international* (Castaignes 1894); Robert Redslob, *Histoire des grands principes du droit des gens depuis l'Antiquité jusqu'à la veille de la grande guerre* (Rousseau 1923).

6 For example, Alfred Verdross, *Die Einheit des rechtlichen Weltbildes auf Grundlage der Völkerrechtsverfassung* (Mohr 1923); C van Vollenhoven, *Du droit de paix* (Njhoff 1932).

7 Wilhelm Grewe, *The Epochs of International Law* (De Gruyter 2000 [1986]); Carl Schmitt, *The Nomos of the World in the International Law of the Jus Publicum Europaeum* (Telos 2003 [1974]).

8 See Anne Orford, *International Authority and the Responsibility to Protect* (CUP 2011).

its underlying legal and philosophical vocabularies. When, how, and where did something like statehood emerge? How have the relations of independent communities been conceived through the years, and with what effect? Jurists have extended the law of independent political communities sometimes into antiquity, sometimes into the relations of non-European communities before colonization.⁹ But a privileged relation still persists between the vocabulary of statehood, the collapse of the Holy Roman Empire, and the end of the universal pretensions of the Catholic Church sometime in European early modernity. From that point, the history of international law has been predominantly about the relations between European States, understood more or less analogously to individuals in a domestic political community. The relationship between Europe and the non-European world has been a kind of a supplement articulated by reference to occasional treaties or diplomatic encounters but more frequently by the laws of *Realpolitik* or political economy; sometimes attention has been on the laws applied by the European state in its overseas possessions ('colonial law'). Whatever their differences otherwise, traditional and postcolonial legal historians have shared a state-centric understanding of the international past. The dynamic of this history has sometimes been understood—especially on the realist side—as so many Polybian circles revolving around the ever-present struggle for power among self-regarding political communities acting on more or less well-understood Machiavellian principles. States and empires come and go but the rules of statecraft remain. Others have imagined the presence of a progressive teleology, perhaps in the grand tradition of the *ius naturae et gentium*, with its direction expressed in the languages of commerce, civilization, and (especially) development. Attitudes towards such direction have then differed in view of the political commitments of the analyst.

II.

Such 'Westphalian' assumptions have allowed wide room for conceiving international law as facilitator of state policy, perhaps part of the very definition of statehood, or maybe as a counterforce to statehood, seeking to tame and seduce states to cooperate for the general good. They have allowed depicting the law of nations as a force of enlightenment as well as 'part of the problem', in need of being overcome by something grander, more universalist. Human rights became in the 1970s and 1980s the predominant vocabulary to challenge international law's state-centrism. It was used to produce principles of governance beyond statehood and to recognise the essential unity of the human race. The same applies to the 1990s projects of institutionalizing free trade in the World Trade Organization (WTO) and enforcing global humanitarianism in warfare through the International Criminal Court (ICC). The histories of the WTO and the ICC still remain to be written—histories that would connect these institutions to the much older trends about binding territorial communities to some logic or vocabulary beyond statehood. Throughout the 20th century, international lawyers have been emotionally and intellectually predisposed as critics of statehood.

9 See, for example, Charles H Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Clarendon 1967); RP Anand, *Studies in International Law History: An Asian Perspective* (Nijhoff 2004).

Their very profession emerged in the late 19th century *against* sovereignty, associated with the expansive nationalism that was rising in Europe.¹⁰ But their attitudes have also been curiously ambivalent—statehood had also been understood as a necessary form of human organization and a shield protecting self-determining communities against outside influence. Much about the jurists' political preferences becomes visible as we see them occasionally siding with states, occasionally rejecting the very principle of statehood.

But whether supporters or critics, international lawyers have broadly agreed that the history of our field is the history of statehood, situated in the realm of the 'international', conceptualised as a terrain of war and peace, diplomatic conflict, and cooperation. Schoolbooks may have given up teaching children only the histories of kings and wars, great events of peace-making, and the succession of proposals for 'perpetual peace'. But the history of the law of nations is still imagined in those terms.¹¹ Little is visible therein of the many turns professional historiography has taken in the 20th century from the *longue durée* or the history of *mentalités* to those of culture and everyday life. A turn to social history with close attention to state/society relations has sometimes been advocated for international relations.¹² But social history and the work of genealogy have yet to penetrate international law—not to say anything about incorporating the complex jurisprudential understandings of the meaning of 'law' into studies of what the past of 'international law' might consist of. Is it, for example, about past rules, practices, institutions, or discourses?

There are understandable reasons for sticking to State-centrism. A history of international law seems parasitical upon the mainstream professional understanding of 'international law', an offshoot of what international lawyers do and how they think about what they do. No doubt it is also supported by the attention paid by the media to foreign policy crises, the performance of diplomats at great conferences, and the movement of military forces shown on the map on the TV. Everything about such images is about 'states' threatened, acting, or being represented. When Georg Friedrich Martens produced his first textbook on international law in Göttingen in 1788, he did this in order to depart from the declining tradition of natural law at German universities and to offer his students a more practical type of instruction in the technical aspects of foreign policy statecraft.¹³ In this, he was immensely successful. Since then, international lawyers have written about statehood, about the treaties

10 Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP 2001).

11 In a recent work, Harald Kleinschmidt has joined the tradition of opening up this understanding chronologically and geographically widely beyond modern Europe, defining international law as the law applied by self-determining political communities between themselves. The focus remains, however, on entities sufficiently analogous to the European 'state' (entities that are 'political' and '*herrschaftlich geordnet*'), so that the narrative flows in a familiar way from 'interstate compacts, in particular the agreements between Ebla (in today's Syria) and Abarsal from the 24th or 23rd century before Christ' to the 'European states-system' of 1618 and the present. *Geschichte des Völkerrechts in Krieg und Frieden* (Francke 2013) 7-8, 24, 177.

12 For example, see Benno Teschke, *The Myth of 1648: Class, Geopolitics and the Making of Modern International Relations* (Verso 2009).

13 Martti Koskenniemi, 'Into Positivism: Georg Friedrich von Martens (1756-1821) and Modern International Law' (2008) 15 *Constellations. An International Journal of Critical and Democratic Theory* 189-207.

they make and follow, the institutions they set up and which they actively try to implement, as well as the rules applied in wars and in diplomatic practices. To a large extent, it is also those same lawyers who prepare and apply those treaties, sit in the institutions states have created, and instruct state representatives about these rules and practices. From that same early 19th century moment comes the practice of teaching 'international law' as 'public international law', a topic in public, not private law. Courses in constitutional and international law are often paired up both ideologically and in practice: they are about the inside and the outside of the state. Chairs of international and constitutional law are often occupied by the same person, or persons sitting in adjoining offices, far away from their private law colleagues, with whom they have little to do (significant national variations persist, however). Treaties, the principles of state representation at international institutions, and war making are topics dealt with by constitutional and international law alike. Even if it was notoriously hard to situate the European Union and EU law into the standard academic divisions, a practice has emerged whereby the institutional law of the EU is taught by experts in public law, while the substantive law of the common market is integrated in the relevant specialist legal fields.

III.

Irrespective of the many critiques of a 'Westphalian' understanding of world politics, a state-centric view haunts the imagination of experts preoccupied with the 'international'. Indeed, it is very hard to see the 'international' apart from through state-centric lenses. The word itself presupposes the 'nation' with an inside and an outside, pushing us to observe 'How Nations Behave'. Although this is a legitimate way to write histories of international law, it does leave much that goes on within and irrespective of state institutions invisible, much that influences or even determines what states do and how they position themselves with respect to particular problems. The by now well-established critique of the 'myth of Westphalia' points out to us that merely to examine statehood may even leave the most interesting and powerful phenomena responsible for the organization of life on the globe invisible. As long as we are preoccupied by states, we miss something of perhaps even greater importance, something that gives statehood its substance, directing it in particular ways, and accounting for our own ambivalence about the moral value or explanatory force of statehood as a principle of human organization. State-centrism in the histories of international law may also contribute ideologically by making it harder to have a full grasp of the mechanisms of global politics.

A standard work in the history of international legal ideas would mention Machiavelli and Hobbes but neither Antoine de Montchrétien nor Adam Smith. Such a work would dwell extensively on the Spanish conquest of the Indies but say little about the carriage of silver from Potosi to Seville, and remain positively silent about its contribution to oiling the wheels of global commerce (to borrow an expression of François Braudel). A standard work would describe in detail Grotius' views about the just war but rarely mention that he regarded the Dutch East India Company as *both* a private company and representative of the United Provinces. It would make mention of Emer de Vattel's *Droit des gens* but not of the view of

Christian Thomasius (and many other German 18th century natural lawyers) that the *ius gentium* was neither law (*iustum*) nor morality (*honestum*) but a set of rules of diplomatic courtesy (*decorum*).¹⁴ Any international legal history would say something about the abolition of the slave trade but little if anything about the contractual form through which that trade was connected with Caribbean sugar production and the export of arms and manufactures to Africa. Its account of North American colonization would rarely include an analysis of the charters under which private companies and individual proprietors would rule the thirteen colonies. Nor would it pay much account to the 17th century uses of the vocabulary of *ius gentium* in Britain to uphold the royal prerogative against common law institutions.

A basic history of international law might treat the East India Company's rule over most of the Indian peninsula from 1757 as an aberration—while it was merely the most conspicuous case of the basic forms of English and early French colonial expansion. And it would have nothing to say about the development and use of instruments such as the letter of credit and letter of exchange as they were transformed from facilitators of trade fairs into building blocks of a wholly global banking system by the end of the 18th century. Studies of *lex mercatoria* might make reference to a series of judgments by Lord Mansfield in the 1770s that gave legal effect to bills of exchange in violation of the common law doctrine of consideration.¹⁵ But histories of international law have so far failed to notice that the autonomy of international mercantile law, recognised in those judgments, would be a crucial instrument in the policy of 'jealousy of trade' that would be regarded as a key element of the 18th century European foreign policy. Virtually no attention has been given to the French efforts during the seven-years' war (1756-1763) to codify a policy of 'balance of trade'—and objections by naturalists such as JHG Justi, according to which this would violate the 'natural freedom' of economic relations.¹⁶

In other words, while international legal histories have meticulously traced the legal trajectories of the foreign policy of states, they have paid much less attention—virtually no attention—to the private law relations that undergird and support state action that become visible only once analysis penetrates beyond the official statements or formal acts of governments and diplomatic chancelleries. The Spanish maintained a formidable imperial presence in the Indies, striving to rule its provinces directly through viceroys and royal *cedulas* issued through the Council of the Indies. However, in reality, the *encomenderos* governed the provinces quite independently from the centre, and royal legislation was frequently left unimplemented. The government lacked funds needed to set up an effective government over territories it was supposed to rule. Borrowing from an international banking system, where the interest rates could not be domestically manipulated, resulted in a series of bankruptcies that paralyzed the central government's ability to effectively govern in the Indies. Now the legal operations carried out through the system of new financial instruments arguably outweighed in their effects on the Indies any formal Spanish

14 Christian Thomasius, *Grundlehren des Natur- und Völkerrechts* (Olms, 2003 [1709]) Bk I Ch 5 § 70 and generally 65-81 (105-108).

15 *Pillans v Van Mierop* (1765) 5 Geo BR 1663, 1669.

16 JHG Justi, *Die Chimäre des Gleichgewichts der der Handlung und Schifffahrt* (Iversen 1759).

legislation at the time. The fact was not lost on Spanish jurists themselves, whose treatises on monetary policy have often been seen as the first in-depth treatments of a global financial system.¹⁷ And yet, neither the new practices nor their articulation in the legal works of Martin de Azpilcueta or Diego de Covarrubias have been given much attention in the histories of international law. The works of the theologian Francisco de Vitoria on the Indies and on just war have of course been examined in great detail—unlike his extensive commentaries on the rights of property and contract that sought to drive a compromise between the orthodox Aristotelian-Thomist suspicion of mercantile actions and the realities of an expanding commercial system.¹⁸

International lawyers have been interested in the vicissitudes of sovereignty. And even when their interest has been inspired by a critical attitude, they have not given up the view that sovereignty is the concept around which legal histories, and hence their criticisms, should revolve. They have, therefore, focused on the emergence of independent ‘states’ and the extent of the sovereign rights states have claimed vis-à-vis each other. They have traced the forms of diplomatic interaction between states and concentrated on war and treaty-making as privileged instances of the formation of an international system of governance and authority. They have set aside any wider interest in the relations of contract and property that support state policies, the development of instruments for long-distance trade, and financing that make not only such trade but also the actions of the sovereign in the ‘international’ space possible. As a consequence they have, with few exceptions, largely failed to notice the great shift in the 17th and 18th centuries that accounted for the ‘jealousy of trade’ becoming a principal aspect of the struggle of international power and a standard of measurement of alternative policies.¹⁹ While histories of international law feel at home discussing proposals for perpetual peace by theologians or philosophers such as the Abbé de Saint-Pierre or Immanuel Kant, not much attention has been given to parallel ideas among writers in ‘political economy’ such as Giovanni Botero or Charles Davenant.

Of course there are exceptions and deviations from the pattern. Some international lawyers have focused attention to the role of *private* international law in addressing ‘some of the biggest problems the law faces today [including] the character of sovereignty [and] the nature of legitimacy in situations of political conflict’.²⁰ But owing to the often intransgressible boundary between public and private law, these have not been many. The prejudice that public law has to do with matters that are by their nature ‘political’, while private law deals with non-political and ‘only technical’ matters, is strong. Collective works on international legal history sometimes include essays on *lex mercatoria* or state debts. Moreover, recent works in

17 Thomas de Mercado, *Suma de tratos y contratos*, (Sierra Bravo 1975 [1553]).

18 See, for example, Martti Koskenniemi ‘The Political Theology of Trade Law: the Scholastic Contribution’ in Ulrich Fastenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (OUP 2011) 90-112.

19 On this theme, see Istvan Hont, *Jealousy of Trade: International Competition and the Nation-State in Historical Perspective* (Harvard University Press 2005).

20 Karen Knop, Ralf Michaels, and Annelise Riles, ‘Foreword’ to ‘Transdisciplinary Conflict of Laws’ (2008) 71 *Law and Contemporary Problems* 16.

private international law have sometimes read the relevant materials through the lenses of international politics or the organization of global trade.²¹ Trade law straddles the private/public boundary, but so far little has been done towards producing credible, non-teleological histories of economic law (that is to say, histories that would not start with Adam Smith or look towards free trade as the inevitable product of a progressive history), especially from the perspective of reading economic decision-making within a State from the perspective of its overall political strategy.²²

Not much historical work has been undertaken to examine the role of property regimes for constitutional law or international policy.²³ There is of course a huge amount of writing on 'mercantilism' (although it is now orthodox to doubt the appropriateness of that word to describe the myriad of economic writings that appeared in Europe between the late 16th and late 18th centuries), but that scholarship rarely examines the legal instruments or institutions that either facilitate or exist as obstacles for efficient trade policy. The relevant literature at the time made much to highlight the role merchants play in enhancing the power of the state. Malynes, for example, insisted in 1629 that 'of the six members of all the governments of monarchies and commonweales [the merchants], are the principal instruments to increase or decrease the wealth thereof'.²⁴ Even as they often discussed about the pros and cons of trade agreements, there is little international law commentary on them.

IV.

In the 16th century the Spanish theologians and jurists who commented on the expansion on the Indies were at least as interested, and frequently more interested, in the principles of international trade that they saw spreading around in Europe, partly as a result of the bullion that became readily available as huge amounts of silver began to circulate in Europe and China, than in the principles of sovereignty and political rule. They were especially concerned about the spread of a new commercial ethic that tended to go against Christian moral principles. Hence they lectured and wrote extensively on the just principles of contract and property that they derived especially from Thomas Aquinas' *Summa theologiae* and produced minute analyses of the practices at trade fairs, in long-distance commerce and currency exchange.²⁵ Although a fair amount has recently been written on the Salamanca School's approaches to what we would now call economic law, little attention has so far been paid to them by international lawyers.²⁶ The great interest such studies would have are highlighted in the Salamancans' view of both the exercise of jurisdiction and property as forms of

21 Alex Mills, *The Confluence of Public and Private International Law* (CUP 2009).

22 An important opening in the Anglophone world in this respect is Thomas Poole, *Reason of State: Law, Prerogative and Empire* (CUP 2015).

23 An interesting exception is Olivier Beaud, 'Constitution, Ownership and Human Rights' in Kelly L Grotke and Markus J Prutsch (eds), *Constitutionalism, Legitimacy and Power: Nineteenth-Century Experiences* (OUP 2014) 127-138 (largely denying that 'capitalist' property rights greatly influenced the French constitution).

24 Gerard Malynes, *Consuetudo, vel, Lex Mercatoria: or, The Ancient Law-Merchant* (London 1629) 62.

25 Wim Decock, *Theologians and Contract Law: The Moral Transformation of the Ius Commune (c. 1500-1650)* (Nijhoff 2014).

26 See further my 'Empire and International Law: The Real Spanish Contribution' (2011) 61 *University of Toronto Law Journal* 1-36.

dominion, or *dominium*, that they understood as a relationship of authority that some people had over others. For the Salamancans, the main question was, under what principles may such interpersonal authority be justified in a world where, as they saw it, God had created humans both free and equal. Their complex considerations about human nature and the nature of the city where humans live produced an influential intellectual defence of institutions we would today call political sovereignty and private property. In both, they saw a relationship of authority between humans—in the one case between the prince and the subject, in the other case between the property owner and everyone else. That they debated the justice of such authority under natural law did not mean they regarded either as beneficent in itself. They were pragmatic accommodations that needed to be made but constantly subjected to critical appraisal from the very principles that justified them. In the course of subsequent centuries, sovereignty and property went down different paths, finding themselves, among other places, in the juxtaposition between ‘public international law’ and ‘private law’.

New postcolonial studies of international legal history are inspired by a keen interest to trace the ways of power within international legal concepts and institutions. It is hard to see a more compelling justification for any legal history, or perhaps any *history* tout court. But if power and authority are the ultimate subjects of these histories, then their scope must be expanded to also capture the migration that has separated the two types of law - sovereignty and property - from each other as well as how, despite their different trajectories, the two can only be well understood in their relationship with each other. They are the yin and yang of global power.