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# Prospects and Limits of a Global History of International Law: A Brief Rejoinder

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As we remarked in the Introduction to our *Handbook*,<sup>1</sup> it is exciting but also risky to leave a well-worn path (at 2). It means meeting unforeseen obstacles. We were quite aware of the fact that if we wanted to shed light on historical developments in international law which so far had remained in darkness or obscurity, we had to be prepared to encounter the unexpected and not so readily understood – that is, accounts and narratives which call into question conventional wisdom and which, at least initially, pose additional problems rather than providing easy answers. We knew that new research on issues which had rarely been examined before would not be perfect or ‘complete’. In other words, we expected, and in fact expressly invited, criticism of a work which tried to break new ground.

What came as a pleasant surprise, though, was a stimulating workshop in Berlin to mark the publication of the *Handbook*. Organized by Alexandra Kemmerer and ‘Rechtskulturen: Confrontations Beyond Comparison’, an initiative of the Wissenschaftskolleg zu Berlin and Humboldt University Law School, the workshop was a generous gift, and we appreciate how much time and energy went into it. We are very grateful to all those who made it possible, and to all who participated in the event. Before a large crowd of interested listeners, some 20 lawyers, historians and political scientists critically discussed in three panels the conception, the structure and the substance of our *Handbook*, focusing on the ‘Encounters’ section, various ‘Themes’ analysed in Part II and, lastly, on a primary motive of the *Handbook*: ‘Overcoming Eurocentrism’. Adding to that gift now is the publication, in this Journal, of revised versions of some of the remarks made at the Berlin workshop.

It is truly rewarding and we feel honoured to receive such lucid comments from a number of scholars who have devoted their precious time to reading and reflecting

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<sup>1</sup> B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (2012).

upon the chapters of the *Handbook*. We are thankful for this pluralist critique which corresponds with the pluralist character of the *Handbook* itself, the contributions to which were written by authors with different cultural, academic and methodological backgrounds.

In this brief rejoinder we can only respond to some of the criticism aptly expressed by the reviewers. We want to focus on some issues which prominently appear in more than one comment. Perhaps the most significant (and not totally unexpected) of those issues, a kind of critical *leitmotif*, is that of an enduring Eurocentrism. Reviewers are critical of what they perceive as a Eurocentric approach underlying the chapters of the *Handbook* (or at least many of them) – in spite of the best will of the editors to avoid and overcome exactly that traditional method or form of accessing the history of international law. It is argued that the attempt to overcome the narrative of a *droit public européen* spread across the world (mainly by trade, conquest, and war), and to replace it by a truly global perspective, is yet another clever European hegemonic move imposing on the non-European world a false universalism, a new academic colonialism. But this reproach, we think, is a ‘killer-argument’. In the end, it rests on the premise that the observer-participant’s intellectual (cultural, emotional, or psychological) mindset is immutable, a premise which is itself essentialist. From that perspective, Eurocentrism is so deeply ingrained in our (European) minds that we are compelled to repeat the past over and over again, despite our best intentions. In that logic, *any* intellectual undertaking by a European scholar is inescapably hegemonic. If that is true, we might as well give up any pretence of scholarship (which after all is characterized by an effort to make statements about a particular object of study that can be *universally* understood, criticized or refuted, independently of the addressee’s nationality, culture or geographical location), and engage instead in politics or novel-writing.

That is not to say that we do not realize the difficulties associated with certain indisputably Eurocentric features of the *Handbook*, one of them being the notion of ‘modern international law’ as established in the Western historiography of international law (at 2 *et seq.*). Even the view of the world as one composed of the several continents named Africa, the Americas and so on is of course Eurocentric. In our Introduction to the book, we admitted these limitations as problems for which we (being no wiser than our fellow historians and lawyers) could not find a solution.

A less expected, but equally fundamental critique of the reviews is that any attempt to write a global history of international law is already *passé* because ‘global history’ is a bygone intellectual fashion which reached its peak in the 1990s, the golden age of globalization. First of all, we want to respond that we never claimed that the *Handbook* embodies ‘the’ global history of international law. Instead, and much more modestly, we suggested that it makes sense, both for the historians and the legal scholars who participated in the project, to take the global history approach seriously, and to gain some inspiration from it. To us, global history is not an ideology but a useful tool – a tool that can and needs to be adapted to the specific requirements of the history of international law. As a method of historical inquiry, the approach is not contingent on the fortunes of globalization in our time. The mere fact of gathering scholars from different regions of the world and inciting them to discuss the drafts of their chapters

both by means of electronic communication and during a workshop in Interlaken was an exercise in globalizing the study of the history of international law.

But what about the criticism that ‘global history’ represents one of the ‘presentisms’ to which students of history easily fall prey, having them project onto the past observations like the waning of the nation state, the emergence of transnational networks, or the impact of various non-state actors (ranging from multinational enterprises to terrorists) on the international legal order? We do see this danger, and the authors of the *Handbook* were aware of it. We realize that our intellectual efforts too, like those of our predecessors, are inevitably shaped and influenced by a particular time and a particular mode of perception. We, like everybody, see the past with the eyes of the present. But how could this be avoided? We are also aware of the warning that ‘global history’ is an over-ambitious approach because a truly global account of past events, texts, and pictures in which everything is connected with everything will end up in total superficiality, in *historiography lite*. But would it not mean to throw out the baby with the bathwater if, in order to escape that danger, we returned to a limited description of certain narrowly defined subjects, such as diplomatic negotiations or peace treaties, calling that ‘the history of international law’? We submit that global history-writing is especially relevant for international law as long as it is properly anchored in the research findings of regional historical studies, refrains from overstretching macro-concepts at the price of glossing over differences, and when it accepts and conceptualizes path dependency and persisting idiosyncrasies.<sup>2</sup>

Is not the new scepticism about the possibility of a global writing of the history of international law also characteristic of a particular time – that is, our time, the second decade of the 21st century? The crisis of international law and the upsurge in ‘state-ism’ which we are witnessing, and which many of us fear will increase in the years to come, weaken our belief in multilateralism and collective action promoting a common global good as it was expressed, so many years ago, in the Charter of the United Nations. We live in a time in which, as in the 19th and early 20th centuries, the legal status of independent statehood is again most cherished and demanded. Groups defined by ethnicity, language or culture which feel marginalized and oppressed, ranging from the Palestinians to the Catalans and the Kurds, seek to establish sovereign states. Human security seems to be best safeguarded in the framework of statehood: people in fragile or failing states are normally worse off than those in stable states. The multilateral architecture built after 1945 and 1990, respectively, is in peril. The United Nations has been marginalized in the Syrian war, UN reform (especially the reform of the Security Council) has been blocked for many years already, the World Trade Organization is bypassed by states concluding bilateral trade agreements, the International Criminal Court is discredited by African states as a neo-colonialist institution. No important multilateral agreements have been agreed upon since the end of the 1990s, although there is a dire need of such new treaty regimes, for example for

<sup>2</sup> See, for an excellent discussion of the critique and limits of global history, Conrad, ‘Kritik und Grenzen der Globalgeschichte’, in S. Conrad, *Globalgeschichte: Eine Einführung* (2013) ch. 4, at 87–111.

the world climate, the effective protection of global biodiversity, for the fair distribution of rare resources like water, or for the regulation of the internet. Instead, ‘soft’ arrangements of all kinds abound, whose lack of legal formality allows the power players to dominate the scene. Concomitantly, we observe in contemporary scholarship (both on the law of the present and of the past) a tendency to proclaim international law as being now (and having been in the past) a mere sub-branch of ‘public law’,<sup>3</sup> or, as Martin Loughlin put it, as ‘a type of political jurisprudence that operates to govern inter-state relations’.<sup>4</sup> There is only a fine line between that view and the insinuation that international law has been and continues to be a mere epiphenomenon of state power and government, a kind of ‘*äußeres Staatsrecht*’.<sup>5</sup>

This rather gloomy state of international legal affairs clearly has an influence on how the past is seen today. But projecting onto the past the current condition of world affairs, which appears to ‘prove’ the enduring significance of the nation state as a locus of power and authority, and hence as the only ‘real’ player throughout history, means writing history backwards no less than the global history approach is criticized for extending into the past a certain ‘optimistic’ or ‘progressive’ perception of international relations, namely that of the 1990s.

In conclusion, we suggest that the current dissatisfaction with globalization and multilateralism is no valid reason for discarding the global history approach. To us, this approach remains a very promising method for the study of the history of international law because it unveils important issues and areas which were blind spots in the traditional Western historiography of the law of nations – especially the pre-colonial ‘international’ relations of peoples in Asia, Africa and the Americas. International law, as the object of study, aspires to be global (or universal), and, as such, deals with transboundary relationships and connections. The tension between the universal aspiration of international law on the one hand, and the particularism of the making, interpretation, and implementation of that law on the other hand is exactly what characterizes international law, and it is the specific strength of the global history approach to be sensitive to that characteristic tension.

And besides, what would be the alternative to writing the history of international law as a global history? A ‘national history approach’ that would focus on, for instance, the emergence of statehood in renaissance France, or on the tributary system of China? While a study of such national or even local phenomena surely can be useful on its own merits, and to a certain extent is also necessary because it provides elements of a history of international law, the latter history is, rightly understood, much more – it is the history of complex encounters, peaceful or violent, of very different actors, powerful or weak, over a period of many centuries.

<sup>3</sup> Cf. the mission statement of The International Society for Public Law (ICONs), to be founded in Florence in June 2014: available at <http://icon-society.org/> (last accessed 28 Jan. 2014).

<sup>4</sup> M. Loughlin, *Foundations of Public Law* (2010), at 87.

<sup>5</sup> Hegel, ‘Grundlinien der Philosophie des Rechts’, in G. W. F. Hegel, *Sämtliche Werke* (vol. 7), originally published in 1821, ed. by H. Glockner 1928, §§ 330 et seq.

As we wrote in our Introduction, ‘the present Handbook is a beginning only. It represents a first step towards a global history of international law. In the words of Robert Frost’s wonderful poem, we tried to take the road “less traveled by”, but we appreciate that we have only come so far.’<sup>6</sup> What the contributions (in all their strengths and weaknesses) have shown is that international law has been (as it is today) in many respects indeterminate, malleable, contradictory, and exploitable for various purposes. We are grateful to those who, as authors of the *Handbook*, joined us in making that journey and, in many cases, were ready to take up a difficult subject without finding much support or guidance in the existing literature.

Many histories of international law, its perceptions and uses, are still unwritten, especially the histories of the peoples conquered, dominated and exploited by Western powers. Many of these histories are extremely difficult or even impossible to write because the necessary sources were destroyed so that the traces leading into a distant past have become invisible, or because languages of the past (in a literal and a broad meaning of the term) are no longer understood. However, what seems clear to us, and what indeed makes us happy, is that the *Handbook* has already fulfilled one of its major purposes: to inspire and encourage (on every continent of the world) more interest in, and more intense research of those many histories.

<sup>6</sup> Fassbender and Peters, *supra* note 1, at 2, referring to R. Frost, ‘The Road Not Taken’, in *Mountain Interval* (1916), at 9.