Bardo Fassbender, Anne Peters, Simone Peter & Daniel Högger (editors)

*The Oxford Handbook of the History of International Law*

The history of international law has traditionally been the least explored area of the discipline. Nevertheless the study of the discipline’s past has experienced an upsurge with the publication of a range of significant works dealing with international legal history. The latest of these publications – the *Oxford Handbook of the History of International Law* edited by Bardo Fassbender, Anne Peters, Simone Peter and Daniel Högger – is a monumental work that includes 44 articles, in addition to 21 biographical portraits, covering a variety of topics related to the discipline’s past.

With most of the articles written by seasoned scholars exploring a range of hot topics, this volume, first of its kind amongst the large collective works, undoubtedly sought to stand out as an authoritative reference for international law’s past both in form and substance. The temporal scope of the book is confined to the start of the discipline in the fifteenth century up to the formal end of imperialism right after the end of the Second World War. Grouped under six diverse segments, articles variously address the key actors in the history of international law (Part I); prominent themes in the history of the discipline such as territory and boundary, cosmopolis and utopia, peace and war, religion and religious intervention, trade and the sea (Part II); different regions of the world (Africa and Arabia, Asia, Americas, Caribbean, and Europe) in international legal context (Part III); the interactive confluence of diplomatic history and domination (Part IV); a guide to method and theory of the history of international law (Part V); and finally, a biographical portrayal of eminent scholars and thinkers ranging from Muhammad al-Shaybānī (749/50–805) to Hersch Lauterpacht (1897–1960) who have immensely shaped the history of international law (Part VI).

Overall, a motto of this presentation of history might be summarized thus: From Exception to the Rule: Revisiting International Law’s Past. The tenor of the book seems to concur with the prevailing opinion amongst some contemporary publicists that international law is essentially victors’ justice, with a penchant for the justification of the exception. This fact is concisely elaborated in a clear and convincing manner in various articles such as those by Arthur Eyffinger, Andrew Fitzmaurice, Matthew Craven, Seymour Drescher & Paul Finkelman, and Liliana Obregón. The European colonization of the Americas

in the fifteenth and sixteenth centuries founded the international society and by analogy a genesis of legal rules for the regulation of interactions in the system. Having laid a solid foundation, this conquest and similar European annexations around the globe continually justified a barrage of exceptions (for example: doctrines of just war, slavery, terra nullius, law of the sea, etc.). Between the sixteenth and the nineteenth centuries, the history of international law was a history of conquerors and victors, not of the victims, with European imperialism justified as something noble, either for the furtherance of progress or the realization of the civilizing mission for non-Europeans.

Another contributor is Martti Koskenniemi who upon revisiting the tense encounters between Europeans and “the other” reveals just how entrenched the claim of defending humanity has historically been front and centre of international law discourse. While interpreting each encounter with ‘the other’, international lawyers perceived the role of Europeans as one of civilizing the behaviours of nations including the colonies (at p. 943–946). Quoting the Belgian jurist Ernest Nys (1851–1920), Koskenniemi illustrates how three ideas dominated world history, to wit: progress, freedom and the idea of humanity – each centred around a European generous contribution to human-kind. Although these goals at a quick glance may appear righteous and noble, they at the same time pose a danger of false universalism.

While the idea of humanity certainly provides the history of international law with a direction and purpose, it could just as well be a smokescreen to shield us from untold stories. This sentiment is echoed by several other contributors in the volume – the likes of Andrew Fitzmaurice, Liliana Obregón, Arnulf Becker Lorca and Anthony Anghie. As the French socialist, Pierre-Joseph Proudhon once famously remarked, “whoever says humanity wants to cheat.”1 Accordingly, in the purported pursuit of international law’s objectives, even the worst of European atrocities on “the other” was vindicated as leading to a better future. Evidently, during its early gestation, the emphasis of ius gentium was geared at subordinating the universe to a particular world order rather than focusing on a just, equitable and fair standard for all humankind.

The book’s examination of selected international legal themes certainly leaves a reader with an impression that developments may effectively begin because of one thing but then they continue because of another. The various encounters between European traders and explorers with the rest of the world

---

led to a rigorous intensification in global trade routes as well as complex political and economic interactions, culminating into what eventually evolved into an intertwined veritable international community. At the onset, trading corporations and chartered companies either engaged in international trade on their own cognizance or were commissioned by their home states to perform public and even sovereign acts.

Eurocentric historical narrative is presented in Parts II and IV of the book as having a unique ideological function, namely, the projection of the particular as universal. It presents international law as a one way street, so to speak – that is, a portrayal of the history of non-Europeans as a looming crisis warranting European intervention or better still as a European response to global predicament. As several of the authors indicate especially in Part III of the book, having appropriated the power to cherry-pick and define what constitutes international law, Eurocentrism, ius publicum Europaeum, has been able to shield its darkest past. That said, this book nicely mirrors Oscar Wilde’s erstwhile famous remark that a map of the world which would not include utopia would hardly be worth glancing at.2 Apparently, utopia has historically always had its way for whatever mission that international law has set its vision on.

Mindful of the fact that the history of international law has been largely ignored by publicists, both the editors and various authors in Part I launch the book by affording a guideline on how to read the history of international law. Suggestively, it can be read from three broad angles, to wit: as a history of people (such as Francisco de Vitoria (1483–1546), Hugo Grotius (1583–1645), Samuel Pufendorf (1632–1694), Henry Wheaton (1785–1848), Lassa Oppenheim (1858–1919), Carl Schmitt (1888–1985), etc.); as a history of events (wars and treaties, the conquest of Americas, the age of enlightenment, the peace of Westphalia, the industrial revolution, the civilizing mission and the colonization of Africa, etc.); and finally, it can be read as a history of concepts (territory, private property, sovereignty, civilized and uncivilized, humanity, etc.). These classifications are hardly a novel development in the discipline. Other scholars have hitherto afforded similar ordering, including the conception of history of international law as one of great epochs – that is, the portrayal of the discipline of international law as one of the policies of dominating great powers (Grewe, Schmitt and Ziegler).3 Each of the above classifications plays the important

---

role of situating the discipline in time and in a proper socio-political context. Given that international law historically is victors’ justice, the evolution of rights in the discipline have largely been dependent on power relations, that is those in command, to define what is right and wrong (at 31–33).

Reading the biographical portraits in Part VI, one may wonder if those eminent historians would recognize the discipline were they to be around today. While some were grounded on utopia, others adopted a realist approach. For Hugo Grotius (1583–1645) who in De Iure Belli Ac Pacis (On the Law of War and Peace) formulated the just war doctrine and Jean-Jacques Rousseau (1712–1778) who recognized that international law (droit public d’Europe) is not stagnant but incessantly evolving from time to time, their ideas have fitted neatly with contemporary international law. The reverse is true for the likes of Francisco de Vitoria (1483–1546), the jurist-theologian from the ‘School of Salamanca’ who specifically denied that there can be no universal civil law and consequently no universal international law claimed as applicable to everybody, as well as Immanuel Kant (1724–1804) who envisaged a worldwide federation strictly directed by the advanced governing the backward – hegemonic stability theory of a sort. But one thing that they certainly all agreed on is the narrative that the desire to live in a community comes with the desire to have community laws, hence the desirability of international law. But this is a contradiction of a sort considering that until the 20th century (and some would argue even beyond), international law functioned according to two parallel histories with the two streams hardly meeting: a history of legal relations between the civilized (the West in effect) on the one hand, and the history of legal relations between the civilized West and the uncivilized non-Europeans.

Although the book has certainly succeeded to a fine degree in resuscitating the background to many international law norms and doctrine, the reverse is just as true, most especially for what was omitted and perhaps a willingness of the authors to agree on some conventional givens. Despite the editors’ acknowledgement in the introduction that it is still rare to write the history of international law from a non-European perspective and moreover that the pre-colonial political institutions of “the other” are grossly ignored by the discipline, very little effort is visible in this volume to remedy the deficiency. There are nevertheless a few voices of dissent, mostly from third world contributors. As James Thuo Gathii claims though without substantiating it in his piece simply titled “Africa”, Africa contrary to conventional myths has always been an...
active participant in the development of international law rather than just some sideline object. Writing about “Africa North of the Sahara and Arab Countries”, Fatiha Sahli and Abdelmalek El Ouazzani concur that some prominent international legal norms are actually of Islamic origin though the discipline has scandalously failed to credit the fact. The authors specifically cite the laws of dhimmi as being the source of laws of warfare and the humane treatment of war prisoners. Another third world contributor, Bimal N. Patel, in his piece captioned “India”, seems to differ by pinpointing laws of warfare and international humanitarian law to practices by Indian kings and princes since 1500. Despite little substantiation, these scholars and other contributors such as Jorge L. Esquirol, Shin Kawashima, David Berry, Ken Coates, Kinji Akashi and Chi-Hua Tang in effect sought to demonstrate that the history of non-Europeans and their contribution to international law was an autonomous development, not a mere reaction to European imperialism.

In fact, Part III is specifically designated to highlight an alternative history of international law from African and Arabian, Asian, American and Caribbean perspectives. Despite contradicting some conventional historical accounts or pointing to a string of omissions, the contributors in this segment in their final submissions nevertheless largely concur with Eurocentric narratives and categories such as statehood, sovereignty, treaty relations and power politics. The segment nevertheless highlights a peculiar positive paradox of the history of the discipline towards non-Europeans, namely: although international law was long utilized as an instrument of domination and oppression, nationalists’ movements in the third world successfully invoked the same international legal norms in their quest for liberation and independence. Despite their controversial origins, many international law’s norms and values eventually evolved into creative forms of cooperation. For instance, the emergence of jus cogens and erga omnes obligations effectively ensured that heinous acts such as slavery, “genocide” on non-Europeans, racial discrimination, torture, wars of aggression and territorial aggrandizement which were formerly justified by the discipline have evolved into universal peremptory norms according to which no derogation is permitted. This is a good reminder that international law is effectively a flexible instrument which can cut both ways: it can be used for good or evil. Optimistically, the arc of the discipline is currently bent toward justice.

Understandably, the contributors to this work were mindful of space. If there is one critique that can run through most of the articles, it certainly would be that the authors generally do not go far enough in their claims. Moreover, for a maiden venture such as this, it would have been helpful to at least highlight the usefulness of the history of international law as well as make
a case as to why we must look into other histories beyond Eurocentrism. Against this question stands yet another: what is wrong with imperialism? Eurocentrism is presented in the book and rightfully so as a historical canker-worm that the world has to live with. But how come so many people from every corner of the world, despite their independence are still freely working diligently to be governed according to Eurocentric caveats: sovereignty, human rights, democracy, etc.?

Again, conscious of space, the book’s failure to address the above issues may not have been an accident but simply a matter of priority. Were I to lend my voice to this volume, I probably would cite the Palestinian poet Mourid Barghouti to make the case that the simplest way to dispossess a people is to tell their story, starting with, “secondly”. If you tell the story of Native Americans focusing not on the European conquest but their magical prowess and hunting techniques, you would arrive at a different outcome. If you tell the history of Africa starting not with the slave trade and the civilizing mission, but rather on its historic kingdoms and achievements, fine art and self-sufficient food economy, you would get an entirely different story, etc.

With most of the contributors generally adopting an explanatory rather than analytical or critical approach, the volume rarely contradicts conventional international legal norms and doctrines. This is not to take credit away from this chef-d’oeuvre which at the very outset I acclaimed for its timely importance. In fact, this brief review limited to providing a glimpse more than an insight cannot purport to do enough justice for a book that is not only voluminous but has dared to enter into an unconventional territory in the discipline: history. Understandably, a holistic narrative with primary focus on the introduction of thematic subjects as a collective undertaking was desirable and to be expected considering the long hiatus in any comprehensive scholarship on international legal history. Hopefully, this initiative would now provoke and open the floodgate for the future to critical thoughts and writings on the history of international law.

Amin George Forji
Doctoral Candidate in International Law, University of Helsinki, Finland