
Is there a Role for Islamic International Law in the History of International Law?

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Overcoming Eurocentrism is one of the self-proclaimed aims of the editors of *The Oxford Handbook of the History of International Law*.¹ In the following, I shall offer a critique of the *Handbook* from a largely Islamic international law perspective as (but) one example of a supranational non-European legal system. The depth of the volume covering a variety of times, spaces, and themes provides us with a much awaited tool against the 'gaps' and the 'forgetfulness'² of how today's doctrines and practices of international law came about, not shying away from the voices that question the narrative of international law serving peace and justice. The *Handbook* is therefore laudable for a number of things.

One, in both the preface and introduction, it necessarily tackles the question of Eurocentrism as a problematic legacy in the field of international law. The editors are frank about the colonial ideology of Europe's civilizing mission in the making of 'modern' international law.³

This conscious choice leads the editors to include the critiques of international law as a field of hegemony in their chapter on 'Methodology and Theory', making voices against Eurocentrism central where previously these voices had been considered marginal or not even worth including in a serious international law publication. Take, for instance, the *American Journal of International Law Symposium on Method in International Law* in 1999, where Third World Approaches to International Law were omitted.⁴ In contrast, the editors of the *Oxford Handbook* made it clear that they understand Third

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

² Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', 17 *Queensland L Rev* (1997) 100.

³ Baxi, 'India-Europe', in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (2012), at 753 (hereafter the *Handbook*).

⁴ After the symposium was published, Professors Anne-Marie Slaughter and Steven Ratner, the editors for the *American Journal of International Law* of a *Symposium on Method in International Law*, 93 *AJIL* (1999) 291 invited Anghie and Chimni to contribute 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', *Chinese J Int'l L* (2003) 77.

World Approaches to International Law as a distinctive way of thinking about what international law is, and how it came about, and that these third world approaches involve the formulation of a particular set of concerns and the analytical tools with which to explore them.

Two, the editors' choice for the global history approach to International Law (at 2) is praiseworthy for a number of reasons: (1) it has the potential to reveal what has been neglected in the contemporary debates in the legal field; (2) it allows us to defamiliarize, to unlearn, a genealogy of a legal narrative that has grown on many scholars, because to reconstruct history often allows us to uncover the many forms of legal domination; and (3) it is commendable because, sometimes, it implicitly makes it easier to speak about something in the past, though sensing, knowing, that the problems are ongoing problems of the present, often in another dress, with another terminology. As Arnulf Becker Lorca writes in his contribution to the *Handbook*, the field of history of international law is lively, precisely because controversies have not been settled.⁵

The *Handbook* also deserves praise because it reflects that all regions of the world have brought, or bring, something to the table in the making of international law, mostly in reaction to each other, in encountering each other.

These encounters are presented in the *Handbook*, however, in a compartmentalized way, provoking a kind of cornering of international legal traditions into regions. As a consequence, whoever is interested in Islamic international legal thought and practice would have to go to Part Three, which is dedicated to regions. The *Handbook* uses as a region 'Africa and Arabia' (these are the terms of the *Handbook*), and as subcategory 'Africa North of the Sahara and Arabic countries', with an article written by Fatiha Sahli and Abdelmalek El Ouazzani, as well as the 'Ottoman Empire', with an article written by Umut Özsu. Also, the *Handbook* includes a portrait of the 8th century jurist Muhammad al-Shaybani, one of the prominent early architects of Islamic international law (*siyar*), by Mashood A. Baderin. It is in these subcategories of 'regions' and 'people in portrait', and almost exclusively in these, that the reader will find valuable and thoughtful information on Islamic international law. However, with the *Handbook* in the introduction so mindful of historiography, Eurocentrism, the role of language, and translation, a short note on this very regionalization and, in particular, the use of the term 'Arabia' might be in order here.

Obviously, the history of Islamic international law is much larger than can be captured under the rubric of 'Africa and Arabia', as significant contributions to Islamic legal thought and legal practice also came from Persia, India, South Asia including Indonesia, Malaysia, and European localities, especially but not exclusively Spain, Italy, Greece, the Balkans, and other places – with this overlap making it difficult to contrast, or even differentiate, Islamic international law with European international law.

But my unease with this rubric is also directed at the very term 'Arabia'. This term is not only geographically imprecise, but also has a firm place in the history of British colonialism of Arab lands, and it reflects how geographic, regional terms came into being at a time

⁵ Lorca, 'Eurocentrism in the History of International Law', in the *Handbook*, at 1056.

in which cataloguing and modern classifications of the world emerged along with colonial expansion.⁶ There is convincing literature on how 'Arabia' as a term was an alluring and terrifying concept for the Englishmen and how not being precise about a region ('for what was the use of being precise about a region of shifting sands and people'⁷) had dire political consequences for the very people of this part of the world. In fact, the correspondence of British colonial officers with Arab leaders – on defining which territories would be handed back to the Arabs in exchange for ousting the Ottomans from Arab lands after World War I – was held similarly vague and obstructed the promised liberation. The deliberate ambiguity of these exchanges ensured that various powers in the Middle East would remain in intractable dispute ever after the demise of the Ottoman Empire.⁸

Again, I am pointing this out because of the overall aim of the *Handbook*, which is, as I understand it, to face the legacy of 'modern' international law, and its embeddedness in colonial history. And as such, at least a disclaimer regarding the term 'Arabia' would have been necessary, as admittedly many other terms are fraught with colonial history as well.

Islamic international law seems to be, therefore, problematically labelled and also pigeon-holed under 'regions' in the *Handbook*. The approach to this legal tradition is not fully problematized, and it is rarely discussed or even referenced in any other encounters or themes in the *Handbook*. The rich tradition of Islamic international law protecting religious minorities, prisoners of war, and diplomats in times of peace or war (and these examples were mentioned by the editors in the introduction), treaties and diplomacy in Islamic international law, Islamic principles of the laws of the sea, are barely interwoven in the thematic contributions of the *Handbook*. Thus, Islamic law is essentially excluded and isolated from the histories of making international law as a whole and its significance marginalized. Islamic international law is at best 'regionalized', at worst portrayed as one of the 'others' of international law.

This account can be evidenced by the following: Out of a total of 617 footnotes in the contributions in the chapter on 'Themes', only ten refer to Islamic international law, with six of them in the article on religion alone. Not one reference to Islamic international law is made in the articles on peace and war, the protection of the individual, trade, or the laws of the sea – all areas where Islamic legal history has made significant contributions, be they in similarity to or difference from European international law, and surely in a way that keeps many of us attentive today. None of the lists of recommended readings in the chapter entitled 'Themes' refers to Islamic international law.⁹ In Part IV on 'Interaction or Imposition' with elaborate contributions

⁶ Z. Lockman, *Contending Visions of the Middle East: the History and Politics of Orientalism* (2nd edn, 2010); P. Satia, *Spies in Arabia: The Great War and the Cultural Foundations of Britain's Covert Empire in the Middle East* (2008).

⁷ *Ibid.*, at 13.

⁸ *Ibid.*, at 14.

⁹ For a discussion of how the interaction between international law and Islamic law can be explored in the fields of International Humanitarian Law, International Protection of Diplomats, International Environmental Law, Universality of Human Rights, Women's Rights, Rights of the Child, Rights of Religious Minorities, and State Practice see, e.g., M. Baderin (ed.), *International Law and Islamic Law* (2008), or the recently published M.-L. Frick and A. Müller (eds), *Islam and International Law* (2013).

on Diplomacy, Discovery, Conquest and Occupation of Territory, Colonialism and Domination, Slavery, and the Civilized and the Uncivilized, a single footnote referencing Islamic international law out of 468 footnotes in total made it into the contributions and, again, zero recommended readings refer to Islamic international law.

Another indication is the table of cases, covering international, national, and regional jurisdictions, treaties, UN secondary sources, and national legislation. In this part of the *Handbook*, very few non-European treaty parties and even fewer treaties exclusively between non-Europeans are listed. This is awkward, given the Islamic history of international treaties, such as the treaties and commercial agreements concluded by the Mamluks (who ruled Egypt and the Levant between the 13th and 16th centuries) with crusader states and Italian city-states such as Venice or Florence. Neither is the history of treaties as an intra-Muslim tool of diplomacy and truces between empires, such as the Ottomans with Safavid-Iran or Mughal India, reflected in the table of cases.

By the very definition provided by the editors, this is not what a global history approach to international law should look like. If global history, as the editors explain, is precisely about not merely assembling all the events of global history, but contextualizing them, to highlight interactions and to embrace methods to narrate and analyse the phenomena, i.e., the legal rule, concept, idea, under investigation, then – despite the intentions set out in the introduction – this is not reflected in the structure and content of the *Handbook*.

An inclusion of the Islamic international law histories would not just have displayed its theoretical and empirical richness across the region, but would also have been a significant contribution to undoing Eurocentrism by actually provincializing Europe and European laws, by overcoming the master-narrative and by contributing to a critical reflection on what the ‘modern’ in modern international law supposedly is.¹⁰ This is being said with a statement in mind that ‘a full-fledged protection of the individual at the international level arrives relatively late in legal history’,¹¹ a statement that surely could be more nuanced, taking into account the Islamic legal contribution to humanitarian law, the protection of religious minorities and prisoners of war.¹²

In explaining how the contributions to the *Handbook* came about, the editors in the introduction ‘specifically asked what the contributions of a specific country or region to the development of international law were’ (at 5). This might be a legitimate question, but the way the book is structured, it can easily turn out to be understood as: ‘What did your legal order and culture contribute to our, European, understanding of the law?’. Positioning the question in such a way runs the risk of failing to appreciate not only how the law was developed by the largely powerful aggressor of modern history but also that international law was a consequence of the resistance to that

¹⁰ For a suggestion of how to deal with Eurocentrism see the four strategies proposed by Koskenniemi, ‘Histories of International Law’, 19 *Rechtsgeschichte* (2011) 152, at 170–175.

¹¹ Kolb, ‘The Protection of the Individual in Times of War and Peace’, in the *Handbook*, at 336.

¹² See, e.g., Bassouni, ‘Protection of Diplomats under Islamic Law’, 74 *AJIL* (1980) 609. Al-Zuhili, ‘Islam and International Law’, 858 *Int'l Rev of the Red Cross* (2005).

aggression, from those on the receiving end of international violence. It is quite conceivable that their resistance has led to new forms of protection under international law, for individuals and states. Also, it would be important to understand past and present crises of international law by asking which contributions, relevant and richly discussed in non-European international legal systems, only very late and without any reference to Islamic international law made it to be recognized as fully international. For example, Islamic international law contains prohibitions on destroying the agriculture and environment during war. The Prophet Muhammad instructed Muslim fighters sent against the Byzantine army not to harm the unresisting inhabitants and 'not to [destroy] the means of their subsistence, nor their fruit-trees and touch not the palm'.¹³

The protection of the natural environment in war has for too long been ignored in the history of international law, and it was only in 1977 that international humanitarian law prohibited environmental warfare in Articles 35 and 55 of Additional Protocol I to the Geneva Conventions.

Internationally, it remains little known that the Islamic international law tradition has been upholding environmental protection during conflicts in its foundational texts since the 1st/7th century AH/CE,¹⁴ and, consequently chances for referencing, including, and strengthening non-European legal traditions in international law had been missed.

Similarly, while Islamic international law has considered sexual violence in war a crime since the 7th century CE, it was not recognized as an international crime until the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY, 1993) included rape as a crime against humanity when committed in armed conflict and directed against a civilian population. In 2001, the ICTY became the first international court to find an accused person guilty of rape as a crime against humanity. Rape in war and other sexual offences have not been considered 'tacitly unavoidable' or even a 'legitimate spoil of war' under Islamic international law. Instead, they were considered war crimes and have also been prosecuted in Islamic international law from the 1st/7th century AH/CE onwards. Any Muslim fighter who commits fornication, rape, and other forms of gender-based sexual violence is subject to stoning to death or to lashing, according to the gravity of the crime and to his status as single or married. A case in point is that of *Khalid Ibn al-Walid v. irar Ibn al-Azwar*.¹⁵ Khalid Ibn al-Walid complained to Umar Ibn al-Khaab, the second Muslim caliph, that irar Ibn al-Azwar, a Muslim army commander, had had sexual intercourse with a captive woman during the war against the people of Asad (Banu Asad) – perhaps comparable to the crimes of sexual violence in Sierra Leone's 1990s civil war, in the former Yugoslavia,

¹³ Qur'an 59:5. See also Zawati, 'Jus ad Bellum and the Rules of Engagement in the Islamic Law of Nations — Shaybānī's Siyar', in *The Hague Report, 2nd Conference in The Hague on Islam, Politics and Law, Perspectives on International Humanitarian Law between Universalism and Cultural Legitimacy* (2009), at 40.

¹⁴ The Islamic, or Hijri calendar (AH, after the Hijra, the emigration of the Prophet Muhammad from Mecca to Medina) begins in 622 of the Common Era (CE).

¹⁵ Al-Bayhaqi, *Al-Sunan al-Kubra* (1304), at 160. See also Zawati, *supra* note 13, at 41.

or the Democratic Republic of Congo. In response, caliph Umar wrote to Khalid, ordering him to stone Ibn al-Azwar to death. Before Khalid had received Umar's judgment, however, Ibn al-Azwar had already passed away.

These prominent examples illustrate a history of lost traditions. It might be difficult to reconstruct the reasons for this loss, asymmetrical power relations or otherwise. However, the fact that legal traditions get lost or ignored demonstrates an important dimension of the historic making of international law as we know it today.

This takes me to my last reservation about the *Handbook*. In the volume, to quite some extent, Islamic international law is presented as largely ahistorical, offering little insight into how ideas, concepts, and rules have developed and changed over time. Yet, Islamic international law is a striking example of how an international legal system that once possessed a strong imperial character has reacted to changing perceptions of threat and re-interpreted its international legal concepts to cope with encroachments on its jurisdiction, territory, and faith. Modernized Islamic international law concepts have thus adapted to resist the prevailing international order and are now displaying similarities of a critique of international law known as Third World Approaches to International Law.¹⁶ However, this historic, paradigmatic shift from a law with a formerly imperial character to law as resistance cannot be captured if Islamic international thought is locked up into one or two formal periods or reduced to a certain region, or not allowed to play a part in the thematic or methodological re-narrations of the history of international law.

And so the problem with regionalization is that it is not only a form of geographically organizing the rich legal traditions of this world (which is simply not accurate). It is also a political and ideological decision that replicates hierarchies (of power and of knowledge), constituting static entities that then 'encounter' in the various forms of dialogues, at best, or wars, at worst.¹⁷ The problem with regionalization is thus compartmentalization, of finely dissecting different zones to avoid dissonances and discomfort about conflicting values, beliefs, and principles. Thus, by having Islamic international law pigeon-holed into regions, the editors allow the readers to avoid dissonances caused by the centuries-long encounters of this legal system with other legal systems, be it Islamic international law as an imperial (and imperialist) form of law or a legal form that has been under attack in word and practice.

It is important, nevertheless, to acknowledge the difficulties in writing a history of international law that is inclusive and comprehensive. We know that our academic backgrounds typically make us either specialists for a particular 'regional' law, such as Islamic law, or particular themes, such as the law of the sea. As this often excludes trajectories of learning, it makes it difficult to recognize and often also acknowledge the historical legacies of the world's legal orders. It seems that this *Handbook* reflects exactly these limits of our respective knowledge, manifesting once again the difficulty

¹⁶ See Samour, 'Modernized Islamic International Concepts as a Third World Approach to International Law', *ZaōRV* (2012) 544.

¹⁷ On the history of international law as based on regions see Anghie, 'Identifying Regions in the History of International Law', in the *Handbook*, at 1058.

for the dominant voices to listen to the marginalized ones. In this sense, it was a missed chance that the editors did not encourage the thematic specialists to engage more with the regional specialists – not by working on something that is not their field, but at least by reaching out to request references, allow for comparisons, and go beyond the familiar manifestations of knowledge.

Just as the preface to the *Handbook* starts beautifully with depicting the oil painting of Ahmed III, Sultan of the Ottoman Empire and his officials receiving the French ambassador with a delegation in 1734, the thematic entry of ‘diplomacy’ would have been a wonderful and symptomatic place of encounter for references to the Muslim voices, practices, or interests of diplomacy, or to any other non-European voices for that matter. The answer to the question whether the editors of the *Handbook* have provided a role for Islamic international law in the history of international law is yes. However, Islamic international law has been given a compartmentalized, isolated role, almost the role of the ‘other’ in international law – the legal order that does not fit the prevailing legal architecture.

It might be that one cannot overcome Eurocentrism in law, because European law is indeed almost everywhere to be found in the regions and histories of this world, including the Islamic international law tradition. Yet, European understandings of international law are not universal, and opposition to its overarching validity has been expressed uninterruptedly.