
Towards a Global History of International Law? Editor's Note

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A Review Symposium on Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (2012)

As usual, international law comes in late. It was already in the golden years of new world orders and geopolitical shifts after the end of the Cold War that historiography began its global turn. Of course, there had been pioneers and path-breakers before, but it was only in the 1990s that an ambiance of globalization and trans-nationalization triggered new approaches on a larger scale. An actual experience of political, economic and cultural interconnectedness put historiographical emphasis on transfers, networks, connections and cooperation, on transformation and translation.¹ Historical analysis was called to overcome not only the boundaries of the nation-state, but also the limitations of material and epistemic Eurocentrism in its various forms. During the past decade, there has been a growing interest in global histories in many parts of the world.

The field of the history of international law, however, has lagged behind. Historians of international law, be they lawyers or historians, did not explicitly turn to global perspectives. The protagonists of the blooming field of global history (or world history, or transnational history), in turn, did not show much interest in the law, be it as a normative concept or a material practice. And post-colonial and subaltern critical approaches in law and history, while widening the scope of inquiry and exploring peripheries, have challenged and often rejected the very notion of the 'global'. In short, the concepts of 'global' and 'modern' are indeed two-edged swords when it comes to understanding the world.²

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¹ For an overview, see Fassbender and Peters, 'Introduction: Towards a Global History of International Law', in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (2012), 8–11 (hereinafter *Handbook*); a more detailed account is now, for example, provided by S. Conrad, *Globalgeschichte: Eine Einführung* (2013), 29–86.

² Cooper, 'How Global Do We Want Our Intellectual History to Be?', in S. Moyn and A. Sartori (eds), *Global Intellectual History* (2013), 283–294, at 292.

I.

In the autumn of 2012, Oxford University Press announced the publication of *The Oxford Handbook of the History of International Law*, edited by Bardo Fassbender and Anne Peters. Not only was there the promise that the volume would provide ‘an authoritative and original overview of the origins, concepts, and core issues of international law’, the publisher also stressed the editors’ ‘global and interdisciplinary approach’.³ Was this not to be a truly intriguing new publication?

The *Handbook* brings together some 60 eminent scholars of international law, history and legal history from all parts of the world. Covering international legal developments from the 15th century until the end of World War II, the *Handbook* consists of 65 individual chapters, arranged in six parts. Following an introduction written by the editors, the book opens with an analysis of the principal ‘actors’ in the history of international law, namely states, peoples and nations, international organizations and courts, and civil society actors. Part Two is devoted to a number of key ‘themes’ of the history of international law, such as peace and war, territory and boundaries of states, trade, hegemony, religion, and the protection of the individual person. Part Three then turns to the history of international law in the different ‘regions’ of the world (Africa and – as the editors call it – ‘Arabia’, Asia, The Americas and the Caribbean, Europe), as well as ‘encounters’ between non-European legal cultures (like those of China, Japan and India) and Europe. Part Four examines certain forms of ‘interaction or imposition’ in international law, such as diplomacy (as an example of interaction) or colonization and domination (as an example of an imposition of law). Part Five is concerned with problems of the method and theory of historiography in international law, examining for instance the periodization of international law, or Eurocentrism in the traditional historiography of international law. The *Handbook* concludes with a final section, Part Six, entitled ‘People in Portrait’, which explores the life and work of 20 prominent scholars and thinkers of international law, ranging from Muhammad al-Shaybani, a scholar of the 8th century, to Sir Hersch Lauterpacht, the scholar and judge of the 20th century.

II.

Indeed, an impressive undertaking, providing much food for thought. But how could there possibly be something like an ‘authoritative account’ of a lively and ever-changing field such as the history of international law, with all its unsettled disciplinary controversies?⁴ How ‘global’ could such a history be? And is ‘global history’ not merely a label for a perspective, an approach?⁵ How would the editors cope with the vast multiplicity of approaches in the new fields of global, transnational or world history?⁶

³ See dustjacket.

⁴ Becker Lorca, ‘Eurocentrism in the History of International Law’, in *Handbook*, *supra* note 1, 1053–1056.

⁵ Conrad, *supra*, note 1, at 12.

⁶ See, e.g., Bayly, Beckert, Conolly, Hofmeyr, Kozol and Seed, ‘AHR Conversation: On Transnational History’, 111 *American Historical Review* (2006), 1440–1464.

How much interdisciplinarity would (and could) there be, if we think of interdisciplinarity as 'integrating, interacting, linking, focusing, blending' disciplinary perspectives? Or would there be examples of fruitful transdisciplinarity, with lawyers, historians and scholars from other fields productively transcending and transgressing the boundaries of their respective disciplines?⁷ Could Eurocentrism indeed be 'overcome', as the editors claimed, but not merely be dealt with in some or another way?⁸ Would history and theory of international law be treated as distinct sub-disciplinary fields or would there just be blurring boundaries and shifting perspectives?⁹

It soon occurred to me that there were many more questions than a single reviewer could respond to. Surely, the editors themselves admitted that 'the present Handbook is a beginning only'.¹⁰ But would it not be tempting to engage historians and lawyers, anthropologists and political scientists in a conversation about the book and, ultimately, the project of a 'global history of international law'? After all, the field of the history of international law and institutions is still neatly subdivided in disciplinary and sub-disciplinary compartments, with lawyers barely speaking to historians, or political theorists or anthropologists, and vice versa.

There are authors' workshops all around these days, in our fast growing *handbook culture*. Why then not convene a reviewers' workshop to collectively assess the outcome of a landmark publication project and pave the way for the next steps to be taken in a vibrant disciplinary field?

I approached the editors with that suggestion, and we decided to make their beginning an action, situating the current volume in relation both to what precedes it and what is to follow.¹¹ Anne Peters and Bardo Fassbender modestly admitted to 'have only come so far' on a 'road less traveled'. But they were quite aware that a collective critical assessment of their *Handbook* would not just be another chapter in a disciplinary narrative of progress and perfection.¹² It might, however, encourage more interest in unwritten histories of international law, and inspire more intense research on such histories. And it might inspire more encounters between scholars from different disciplinary backgrounds, and more transdisciplinary adventures.

⁷ See Kemmerer, 'Dignified Disciplinarity: Towards a Transdisciplinary Understanding of Human Dignity', in C. McCrudden (ed.), *Understanding Human Dignity* (2013), 649–658. For the taxonomy, I draw from Thompson Klein, 'A Taxonomy of Interdisciplinarity', in R. Frodeman, J. Thompson Klein, and C. Mitcham (eds), *The Oxford Handbook of Interdisciplinarity* (2010), 15–30.

⁸ For a suggestion of four directions to deal with Eurocentrism in International Law, see Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism', 19 *Rechtsgeschichte* (2011), 152–176, 171–176.

⁹ On the need for distinctions, see Kemmerer, 'The Turning Aside. On International Law and its History', in R. A. Miller and R. M. Bratspies (eds), *Progress in International Law* (2008), 71–93; for a pointed critique of an 'intensely internalist' historiography by 'lawyers seeking the antecedents of contemporary law and the profession', see Katz Cogan, 'Book Review' of B. Fassbender and A. Peters, eds, *The Oxford Handbook of the History of International Law*, 108 *American Journal of International Law* (2014 forthcoming).

¹⁰ *Handbook*, *supra*, note 1, at 2.

¹¹ On beginnings, see Craven, Drew, Humphreys, Lang, and Marks, 'Editorial: The London Review of International Law Begins', 1 *London Review of International Law* (2013), 1–5, at 1 (with reference to E. Said, *Beginnings: Intention and Method*, 1975).

¹² For a critical reconstruction, see T. Skouteris, *The Notion of Progress in International Law Discourse* (2010).

A constellation of people and institutions connected with the Berlin research programme *Rechtskulturen*¹³ provided the space to engage in a multidisciplinary conversation, further encouraged by the German Council of Science and Humanity's recent recommendations to re-think legal scholarship.¹⁴ On 1 February 2013, a group of 22 historians, political scientists, sociologists, anthropologists and lawyers met at Magnus-Haus on Kupfergraben in Berlin for a day-long *Rechtskulturen* workshop to take stock of the *Handbook*, its achievements and shortcomings. They engaged in 'confrontations beyond comparison', true to *Rechtskulturen*'s motto. Throughout the day, an audience of more than 80 more scholars and students participated in the discussions, among them a number of authors who had contributed to the *Handbook*.¹⁵ In the vibrant centre of Berlin, Kupfergraben – the street where Hegel lived while teaching at Humboldt University – is indeed a 'road less traveled', with Magnus-Haus situated next door to the chancellor's modest apartment.

Anne Peters and Bardo Fassbender generously and courageously agreed to take the risk of controversial responses, to face three panels of diligent and critical readers and to respond to their questions, comments and remarks.¹⁶ The speakers were invited to reflect upon the book, to praise and criticize – against the backdrop of their own research questions and disciplinary backgrounds.

III.

This symposium takes up a number of the questions and challenges that were discussed in Berlin. It offers a glance on the critical and constructive comments and statements presented by the speakers, on controversial discussions and vibrant conversations. Far from providing a comprehensive set of workshop proceedings, it features voices that are exemplary but not entirely representative of the rich variety of contributions and interventions discussed on that winter's day in Berlin.

Five authors share their reflections on the volume. Three of them are international lawyers, one also a scholar of Islamic law, and two are historians with particular expertise on Russia and Egypt, respectively. In their work, they employ methods and tools from anthropology, sociology, political science – and yet the focus lies still with law and history, as it was in the day-long workshop. An ethnographic understanding of the workshop and the resulting symposium (following Annelise Riles and inspired by her seminal observations at the intersections of anthropology and human rights law) unveils, first and foremost, multiple spheres of legal and historical knowledge practice and knowledge production. The discursive space between history and law is dominated

¹³ www.rechtskulturen.de; the programme is an initiative of the Wissenschaftskolleg zu Berlin and Humboldt University Law School at the Forum Transregionale Studien.

¹⁴ Wissenschaftsrat, *Prospects of Legal Scholarship in Germany: Current Situation, Analyses, Recommendations* (2012); www.wissenschaftsrat.de/download/archiv/2558-12_engl.pdf.

¹⁵ Steinbeis, "'Not universal, but all over the place": Zur Globalität der Geschichte des Völkerrechts', *Verfassungsblog*, 9 February 2013, www.verfassungsblog.de/de/not-universal-but-all-over-the-place-zur-globalitat-der-geschichte-des-volkerrechts/

¹⁶ For the workshop programme, see www.rechtskulturen.de/fileadmin/pdf/rechtskulturen/Kalender/2013-02/RK-Towards_A_Global_History_of_International_bochure.pdf

and at the same time animated by respective instrumentalisms of knowledge. Historians and lawyers who critically engage the history of international law encounter a common problem – ‘the problem of the iron cage of instrumentalism’ – ‘although from the vantage point of different starting problems and ultimate solutions’.¹⁷

All contributions address the editors’ explicit intention to ‘overcome Eurocentrism’ – and all of them are rather sceptical about that claim not being merely a symbolic gesture, with strong traces of Eurocentrism still prevalent in the book. Their critical assessments are, however, not repetitive. Each contribution responds to the challenges of material and epistemic Eurocentrism from a distinct position and perspective, shaped by the author’s disciplinary background and regional expertise. The contributors share an explicit and reflexive positionality and situatedness that might be a necessary starting point for any future endeavour to research and write global histories of international law.

IV.

The first essay by Rose Parfitt sketches the ‘spectre of sources’ haunting a discipline trapped within the confinements of epistemic Eurocentrism. Parfitt argues that meeting the editors’ goal would have required nothing less than a revolutionary re-imagining of international law and its history – and elaborates some of the particular challenges that such a task presents for international legal doctrine. But is a liberation of the historiography of international law from the constraints of sources doctrine possible without transforming it into a historiography of something else? In Parfitt’s view, only by challenging the substantive (Eurocentric) teleology inherent in international law’s orthodox approach to sources with the kind of methodological (critical) teleology offered, for instance, by Walter Benjamin’s ‘materialist historiography’ could the conditions be created in which a more ‘global’ and hence more ethical history of international law might emerge.

Stefan Kirmse, a historian working in the field of historical anthropology of Russia and Eurasia, also takes issue with the *Handbook*’s ambition to present a non-Eurocentric history of international law and calls for a truly non-teleological account of international law that does not limit itself to a history of the road towards today’s international law, to a linear narrative and trajectory, but that is also a history of sleepy side alleys and dead ends. Kirmse emphasizes that an alternative history of international law would have to focus on the rules and customary practices by which states and other independent political entities operated at certain periods in history, bilaterally, multilaterally, or within sub-regions of the globe, and points to the geographical and cultural limitations of legal education. While he praises the volume for including regions, debates, scholars that have so far largely remained outside mainstream debates, he also observes that many of its chapters do not live up to the editors’ promise and that the book’s very design and structure perpetuate Eurocentric analysis.

¹⁷ Riles, ‘Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage’, 108 *American Anthropologist* (2006), 52–65, at 54.

Nahed Samour, an international lawyer and scholar of Islamic law, offers a critique of the *Handbook* from the perspective of a supranational non-European legal system. Samour acknowledges that the editors have provided a role for Islamic international law within the overall framework of the volume, but deplores that it has been given only a compartmentalized, isolated role, hidden in Part Three ('Regions'), and that it is presented as largely ahistorical and static, despite the significant changes which the Islamic system of international law has undergone over time. Samour unmasks the editors' regionalization as a political and ideological decision that replicates hierarchies of power and knowledge, allowing the readers to avoid dissonances and discomfort about conflicting values, beliefs, and principles. A set of prominent examples of Islamic legal contributions to humanitarian law, the protection of religious minorities and the prisoners of war illustrates a history of lost traditions that indeed merits future reconstructions.

Preparing his essay, Will Hanley surveyed the scholarship assembled in the *Handbook* and found rather few resources to tackle the centrality of states and of ideas in the historiography of international law. He suggests looking beyond ideas in explaining the workings of the law, and to complement histories of concepts with histories of practices. Arguing for such a broadening of methodological scopes, he uses the phenomenon of statelessness to think with. In his own research on late 19th-century Alexandria (in Egypt), the historian found numerous stories of individuals experiencing shifts in their legal standing and national affiliation due to shifts in public international law. While the problem of national affiliation was settled in the conceptual realm, in the realm of practice the reality of statelessness endured. Hanley explores what might be gained by treating statelessness as a theme of international legal history. Statelessness can be cast as a question of law, and indeed of international law, he argues, but only if one reads between the lines—and that would perhaps be the job of non-lawyers.

Anne-Charlotte Martineau, in her essay, observes a striking resilience of Eurocentric voices in the *Handbook*, despite the editors' express aim at 'overcoming Eurocentrism'. A profound shift of perspectives on the history of international law would have required a radical shift of vocabulary, she explains – and more radical editorial politics, one might add. The distinctively Eurocentric structure of the *Handbook* is, in Martineau's view, a result of the editors' strong liberal assumptions. The problem with such a liberal-pluralist approach, she stresses, is not only that it flattens differences and reduces political projects to commodities, but also that it makes its own politics invisible. While she insists on the need to continue with post-colonial critique, Martineau also points to the importance of expanding critical inquiry to other contexts than European colonialism and its afterlife. When rethinking the emancipatory potential of international law, attention should also be paid to other forms of oppression and discrimination, involving class, gender, religion and violence.

V.

Critique as voiced in these contributions is indeed a beginning, situating the *Handbook* under review in relation both to what precedes it and what is to follow. It allows us to rethink not only the law and its potential, but also ourselves and our potential – as

historians, lawyers, legal historians, international lawyers, historians of international law, as scholars and practitioners. A history of international law in Global Historical Perspective is in need of new contextualizations, but may also allow for new positions and reflexive disciplinarity.¹⁸ We can draw from a wealth of existing research, from disciplinary discourses and methodological toolboxes, and from experimental approaches incorporating, for example, impulses from cultural studies, psychoanalysis and post-colonial theory into a close scrutiny of archival files and data material.¹⁹ The perspective of Global History (or, more precisely: Global Histories) challenges us to reframe our paradigms, to reconceptualize times and spaces and to rethink the law as a discipline and a practice.

Individual Contributions

Bardo Fassbender and Anne Peters: Introduction: Towards a Global History of International Law

Part One: Actors

1: Jörg Fisch: Peoples and Nations

2: Antonio Cassese: States

3: Randall Lesaffer: Peace Treaties and the Formation of International Law

4: Janne Elisabeth Nijman: Minorities and Majorities

5: Joaquín Alcáide Fernandez: *Hostes humani generis*: Pirates, Slavers, and other Criminals

6: Cornelis G. Roelofsen: International Arbitration and Courts

7: Anne Peters and Simone Peter: International Organizations: Between Technocracy and Democracy

8: Cecelia M. Lynch: Peace Movements, Civil Society, and the Development of International Law

Part Two: Themes

9: Daniel-Erasmus Khan: Territory and Boundaries

10: Dominique Gaurier: Cosmopolis and Utopia

11: Mary Ellen O'Connell: Peace and War

12: Antje von Ungern-Sternberg: Religion and Religious Intervention

13: Robert Kolb: The Protection of the Individual in Times of War and Peace

14: Koen Stapelbroek: Trade, Chartered Companies, and Mercantile Associations

15: David J. Bederman: The Sea

¹⁸ See, for a thoughtful contextual research agenda: Duve, 'Von der Europäischen Rechtsgeschichte zu einer Rechtsgeschichte Europas in globalhistorischer Perspektive', 20 *Rechtsgeschichte* (2012), 18–71; http://data.rg.mpg.de/rechtsgeschichte/rg20_018duve.pdf; see also: Duve, 'European Legal History – Global Perspectives. Working Paper for the Colloquium "European Normativity – Global Historical Perspectives"', Max Planck Institute for European Legal History Research Paper Series No. 2013-06. Available at SSRN: papers.ssrn.com/sol3/papers.cfm?abstract_id=2292666

¹⁹ N. Berman, *Passion and Ambivalence: Colonialism, Nationalism, and International Law* (2011).

Part Three: Regions

I. *Africa and Arabia*

- 16: Fatiha Sahli and Abdelmalek El Ouazzani: Africa North of the Sahara and Arab Countries
- 17: James Thuo Gathii: Africa
- 18: Umut Özsü: The Ottoman Empire and the Abode of Islam

II. *Asia*

- 19: Shin Kawashima: China
- 20: Masaharu Yanagihara: Japan
- 21: Bimal N. Patel: India

III. *The Americas and the Caribbean*

- 22: Mark W. Janis: North America: American Exceptionalism in International Law
- 23: Jorge L. Esquirol: Latin America
- 24: David Berry: The Caribbean

IV. *Europe*

- 25: Martin Kintzinger: From the Late Middle Ages to the Peace of Westphalia
- 26: Heinz Duchhardt: From the Peace of Westphalia to the Congress of Vienna
- 27: Milos Vec: From the Congress of Vienna to the Paris Peace Treaties of 1919
- 28: Peter Krüger: From the Paris Peace Treaties to the End of the Second World War

V. *Encounters*

- 29: Chi-Hua Tang: China–Europe
- 30: Kinji Akashi: Japan–Europe
- 31: Upendra Baxi: India–Europe
- 32: Lauri Mälksoo: Russia–Europe
- 33: Kenneth Coates: North American Indigenous Peoples' Encounters

Part Four: Interaction or Imposition

- 34: Arthur Eyffinger: Diplomacy
- 35: Andrew Fitzmaurice: Discovery, Conquest, and Occupation of Territory
- 36: Matthew Craven: Colonialism and Domination
- 37: Seymour Drescher: Slavery
- 38: Liliana Obregón Tarazona: The Civilized and the Uncivilized

Part Five: Methodology and Theory

- 39: Martti Koskeniemi: A History of International Law Histories
- 40: Anthony Carty: Doctrine versus State Practice

- 41: Oliver Diggelmann: The Periodization of the History of International Law
- 42: Kaius Tuori: The Reception of Ancient Legal Thought in Early Modern International Law
- 43: Arnulf Becker Lorca: Eurocentrism in the History of International Law
- 44: Antony Anghie: Identifying Regions and Sub-Regions in the History of International Law

Part Six: People in Portrait

- 45: Mashood A. Baderin: Muhammad al-Shaybani (749/50–805)
- 46: Annabel Brett: Francisco de Vitoria (1480–1546) and Francisco Suárez (1548–1617)
- 47: Merio Scattola: Alberico Gentili (1552–1608)
- 48: Peter Haggemacher: Hugo Grotius (1583–1645)
- 49: Knud Haakonssen: Samuel Pufendorf (1632–1694)
- 50: Knud Haakonssen: Christian Wolff (1679–1754)
- 51: Kinji Akashi: Cornelius van Bynkershoek (1673–1743)
- 52: Georg Cavallar: Jean-Jacques Rousseau (1712–1778)
- 53: Emmanuelle Jouannet: Emer de Vattel (1714–1767)
- 54: Pauline Kleingeld: Immanuel Kant (1724–1804)
- 55: Armin von Bogdandy and Sergio Dellavalle: Georg Wilhelm Friedrich Hegel (1770–1831)
- 56: Lydia H. Liu: Henry Wheaton (1785–1848)
- 57: Silja Vöneky: Francis Lieber (1798–1872)
- 58: Simone Peter: Bertha von Suttner (1843–1914)
- 59: Lauri Mälksoo: Friedrich Fromhold von Martens (Fyodor Fyodorovich Martens) (1845–1909)
- 60: Mathias Schmoeckel: Lassa Oppenheim (1858–1919)
- 61: Oliver Diggelmann: Max Huber (1874–1960)
- 62: Oliver Diggelmann: Georges Scelle (1878–1961)
- 63: Bardo Fassbender: Hans Kelsen (1881–1973)
- 64: Bardo Fassbender: Carl Schmitt (1888–1985)
- 65: Iain G.M. Scobbie: Sir Hersch Lauterpacht (1897–1960)