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## Book Review

Lauren Benton and Lisa Ford. ***Rage for Order: The British Empire and the Origins of International Law, 1800–1850***. Cambridge, MA: Harvard University Press, 2016. Pp. 288. \$39.95. ISBN: 9780674737464.

Andrew Fitzmaurice. ***Sovereignty, Property and Empire, 1500–2000***. Cambridge: Cambridge University Press, 2014. Pp. 378. \$102. ISBN: 9781107076495.

### 1. Benton and Ford and Fitzmaurice: A Note on Methodology

Notably, three historians have written the two books on international law under review here. They represent a welcome change from the works by lawyers writing in the last two decades on the history of international law. These writings of the last two decades are said to have inaugurated the so-called ‘turn to history’. Originally, C.H. Alexandrowicz, based in India in 1951–1961, offered, if you will, the first moment in the turn to the history of the law of nations and empire in that he studied East Asia, Indochina and South Asia.<sup>1</sup> Evidently, historians and lawyers affiliated to post-colonial and post-structuralist traditions have been doubtless cross-pollinating since the decolonization of Asia and Africa.<sup>2</sup>

<sup>1</sup> D. Armitage and J. Pitts (eds), *C.H. Alexandrowicz: The Law of Nations in Global History* (2017), at 3 saying: ‘The origins of ... the history of international law and ... empire lie in the work of ... Alexandrowicz.’

<sup>2</sup> Telling academic lawyers from historians of international law in an interdisciplinary world is, however, difficult if not also futile. Extending the cross-pollination metaphor, the production of honey – i.e., knowledge – requires lawyers revisiting the historians for a considerable number of times and vice versa. J.J.G. Syatauw, *Some Newly Established Asian States and the Development of International Law* (1961); C.H. Alexandrowicz, *An Introduction Law of Nations in the East Indies* (1967), both based in the global south – Indonesia and India – took a definite turn to the history of international law. However, while Syatauw looked at the history of the 20th century, Alexandrowicz studied the 16th to 18th centuries. In the world after the New International Economic Order, B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd edn, 2017); Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’, 40 *Harvard International Law Journal (HILJ)* (1999) 3; Gathii, ‘Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations’, 15 *Leiden Journal of International Law (LJIL)* (2002) 581, *inter alia*, inherited that tradition with Chimni unpacking imperialism, Anghie putting – for the first time ever – a clear emphasis on colonialism and Gathii questioning the positivist nature of the history of international law’s universalization in territorial disputes. In 2005, Matthew Craven, ‘What Happened to Unequal Treaties? The Continuities of Informal Empire’, 74 *Nordic Journal of International Law* (2005) 382, critiqued Anghie for having overlooked ‘imperialism’ for ‘colonialism’. A few months later, Anghie emphasized ‘imperialism’ in the title of his modern classic – A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005). A year before, historian Richard Horowitz had theorized that the transformation of East Asia using international was a ‘joint enterprise’ of the Europeans and Asians. Horowitz, ‘International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century’, 15 *Journal of World History* (2004) 445, 460. A year later, Sundhya Pahuja, ‘The Postcoloniality of International Law’, 46 *HILJ* (2005) 459 argued for the imperial origins

Even so, must we burden the 21st-century historians of international law with our expectations of novelty in methods and conclusions? That lawyers and historians deploy different methodologies is rather obvious. We might even find historians of international law adding to our knowledge and method in a way that is different from the work of the lawyers of the law of nations.<sup>3</sup> However, the distinction between lawyers and historians of international law should not be seen as a simple binary. Nevertheless, their convergence on the history of international law does not ossify their varied methodological training. Indeed, the history of international law is still in search of a proper methodology with a result that, as Valentina Vadi puts it, two cultures of writing history of international law compete in its making: “‘historians’ histories” and “‘jurists’ histories”.<sup>4</sup>

However, what is the state of affairs of the historians’ histories as we speak? That Michel Foucault’s theory of knowledge/power and Edward Said’s critique of Orientalist knowledge have profoundly shaped historiography is well known. Most recently, historian Sanjay Subrahmanyam suggests we separate Said’s critique of Orientalist knowledge from its ostensible anchoring in Foucault’s theory of knowledge/power.<sup>5</sup> At any rate, freeing Said from the shadows of Foucault is an inadvertent, even if unacknowledged, phenomenon in the post-colonial scholarship on empire and international law.

To be sure, based on their location and inhabited epistemological spaces, Saidian jurists from the global south have always made this separation from post-structuralist lawyers studying the universalization of international law. Nevertheless, two types of pushback on Foucault and Said among historians are, however, now visible. The adherents of a new ‘orthodox Marxist historiography’ as well as the disciples of a ‘continuity thesis’ – those who conflate pre-colonial and colonial political regimes and knowledge systems – today reject both Said and Foucault. In some ways, this rejection of a pre-colonial knowledge system ‘barely conceal[s] anxiety regarding the identity-politics of contemporary Europe’.<sup>6</sup> Historians of international law and lawyers thus become strange bedfellows even as historians’ histories and jurists’ histories compete to cut out a distinctive territory for themselves. Besides, this substantiates the varied post-colonial and post-structuralist affiliations of lawyers of international law alluded to earlier. The two books under review are therefore historians’ histories of international law and empire.

It goes without saying that much of the scholarship on the history of international law takes instructions from the Cambridge School. According to Lauren Benton, the Cambridge School overly emphasizes the role of individual scholars in reading history: ‘Grotius’s writings, or the Peace of Westphalia, functioned as a foundational moment in the history of the interstate

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and post-colonial future of international law. Subsequently, borrowing heavily from, both, Horowitz and Craven, Arnulf Becker Lorca, ‘Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation’, 51 *HILJ* (2010) 536, re-explained that the universalization of international law was achieved by semi-peripheral lawyers who brought international law home from Europe. Koskeniemi, ‘Expanding Histories of International Law’, 56 *American Journal of Legal History* (2016) 104–112.

<sup>3</sup> For a comprehensive bibliography on the ‘turn to history’, see Skouteris, ‘Engaging History in International Law’, in J.M. Beneyto and D. Kennedy (eds), *New Approaches to International Law* (2012) 99, at 119. S.C. Neff, *Justice among Nations: A History of International Law* (2014).

<sup>4</sup> Vadi, ‘International Law and Its Histories: Methodological Risks and Opportunities’, 57 *HILJ* (forthcoming 2017). Crawford & Miles, ‘Four Ways of Thinking about the History of International Law’, in J.C. Sainz-Borgo et al (eds), *Liber Amicorum: Guðmundur Eiriksson* (2017) 288.

<sup>5</sup> S. Subrahmanyam, *Europe’s India: Words, People, Empires: 1500–1800* (2017), at xii.

<sup>6</sup> *Ibid.*

order.<sup>7</sup> Therefore, ‘upend[ing] some historians’ claim about the British Empire’s role in global political and legal change’, Lauren Benton and Lisa Ford also upset lawyerly conclusions on the history of the law of nations (at 191). As a first, Benton and Ford reject the application of the history on international law by the Cambridge School.<sup>8</sup>

In effect, *Rage for Order* challenges, even rejects, the role of publicists and judicial precedents – international law’s subsidiary sources – in favour of a narrative according to which the British Empire, while curbing the slave trade ‘tended to bypass Universalist claims about human rights in favor of a messy attempt to fill treaty gaps with circumscribed extensions of municipal law’ (at 191). Not the haloed jurists but, rather, a ‘jurisdictional imperialism’ through British courts enveloped colonies to make them part of the British Empire (at 25). That is how international law universalized in the account given by Benton and Ford. This ontological view amends Becker Lorca’s finding that jurists, although non-Western, universalized international law. For *Rage for Order*, Becker Lorca’s arguments also become a sub-category of the Cambridge School. Indeed, much of international law’s history has been penned as biographical accounts of European publicists. Not for Benton and Ford, however. Yet there is a difference between the jurisdictions covered by Becker Lorca, on the one hand, and Benton and Ford and Andrew Fitzmaurice, on the other. While the former covers semi-colonies under imperialism, the latter cover colonies in Asia and Africa under direct colonial rule.

The law of nations definitely bled into international law by the end of the long 19th century. However, all three historians – Benton and Ford and Fitzmaurice – interpret this transformation differently. As a matter of choice, Benton and Ford focus on the first 50 years of the 19th century, while Fitzmaurice studies five centuries from 1500 AD through to 2000 AD. Besides, while Benton and Ford study the British Empire, Fitzmaurice studies empires in general. This difference in scope of about four-and-a-half centuries between the two books has major consequences for the method, analyses and conclusions. While Benton and Ford persuasively reject the prior lawyerly treatment of the history of international law, Fitzmaurice follows the Cambridge historicism as a method. Not that the European tradition is not critical of the relationship between empire and international law. But an excessive focus on nesting legality in the words of Emer de Vattel and Henry Wheaton, among countless Western publicists, misses the ontology of international law’s universalization. Dipesh Chakrabarty finds it ‘wrong to think of postcolonial critiques of historicism ... as simply deriving from critiques already elaborated by postmodern and poststructuralist thinkers of the West’.<sup>9</sup> Chakrabarty’s rejection of post-structural historicism becomes all the more evident, as Subrahmanyam would have us believe, the French historians of Foucauldian brand ‘for the most part resolutely turned their backs on the empire and colony’.<sup>10</sup> In effect, to practise post-structuralist historicism as an assumption ‘first in the West, and then elsewhere’ defeats knowledge of history and therefore that of the history of international law.

Benton and Ford have successfully avoided the Achilles heel of epistemology that Chakrabarty speaks of. Moreover, they seem to have inherited the tradition of the historian of the East, Prasenjit Duara, who famously theorized the role that private actors such as academics,

<sup>7</sup> Benton, ‘From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870–1900’, 26 *Law and History Review* (2008) 595.

<sup>8</sup> For the leading proposition on the Cambridge School, see Skinner, ‘Meaning and Understanding in the History of Ideas’, 8 *History and Theory* (1969) 3.

<sup>9</sup> D. Chakrabarty, *Provincializing Europe* (2000), at 6.

<sup>10</sup> Subrahmanyam, *supra* note 5, at xiii.

journalists and colonial bureaucrats played in fomenting the 1919 Korean nationalist uprisings against Japanese semi-colonialism.<sup>11</sup> Much like Duara's stress on the role of private actors, and Sunil Amrith's planting of the Bay of Bengal 'at the heart of global history',<sup>12</sup> Benton and Ford's methodology of treating exoticized subjects such as convicts, judges, indigenous peoples, slaves and masters, as well as the metropolis and periphery as equal partners in the oceanic order of the British Empire, offers a ringside view of the universalization of international law (at 115). They choose to explain the universalization of international law by the epithet of 'jurisdictional imperialism' (at 25). In fact, *Crossing the Bay of Bengal* and *Rage for Order*, if you will, use exactly the same interlocutors to present the story of empire and law, albeit from the colony and the metropolis respectively.<sup>13</sup> And in yet another register, Benton and Ford seem to be advancing what Judge Richard Posner calls 'the ontology of [international] law'.<sup>14</sup>

Fitzmaurice, on the contrary, takes the descriptive approach. Benton and Ford use the politics of 'jurisdiction' as the currency, while Fitzmaurice finds purchase in the idea of 'occupation' in the making of Empires. Fitzmaurice studies publicist after publicist to investigate the clawing nature of the doctrine of occupation. The relationship of empire and international law appears symbiotic in Fitzmaurice's account. For him, the publicists instructed the empires with their theories, and, with time, the empires tested the worth of their theories in their greed for colonies.

Not that the two books do not have any commonalty apart from being written by historians. If we were to go by their titles, decoding the relationship between empire and international law sits at their core. Moreover, both books investigate the transformation of the law of nations into international law in the late 19th century. Finally, both books emphasize the role of civil law in midwifing international law in England. Fitzmaurice, for example, speaks of civil law on a number of occasions: '[T]he civil law in England' (at 229), '*res nullius* and civil law' (at 260) and 'German civil law and the law of nations' (at 217–227). Despite their common pursuit, the books take vastly different paths. Fitzmaurice adds to our knowledge an analysis of the often-conflated distinction between *terra nullius* and *territorium nullius* after a rigorous and enlightening history of occupation, property and international law. While Benton and Ford speak of the *Rage for Order*, Fitzmaurice proffers the rage for empire. While Benton and Ford are ontological in method and subaltern in spirit, Fitzmaurice is descriptive analytical.

## 2. *Rage for Order* between Privates and Pirates

*Rage for Order* is divided into seven chapters. Benton and Ford:

narrate[] an untold story of uncommon dimension: a sprawling attempt to reorder the early nineteenth-century world through the redesign of British imperial law. Drawing on legal knowledge and practices across cultural and political divides, the project of reordering the empire through law developed in multiple registers on a global scale. It changed the composition of world regions and installed empire as the ghost in the machine of global governance. ... The British Empire mattered as a legal force in the world in the early decades of the nineteenth century, when natural law rhetoric waned, positive law visions were inchoate, and the British Empire seemed poised to become powerful enough to impose its own order on the world' (at 1, 196).

<sup>11</sup> P. Duara, *Sovereignty and Authenticity: Manchukuo and the East Asian Modern* (2003), at 78.

<sup>12</sup> S. Amrith, *Crossing the Bay of Bengal: The Furies of Nature and the Fortunes of Migrants* (2013), at 1.

<sup>13</sup> *Ibid.*, ch. 7 'The Pursuit of Citizenship'.

<sup>14</sup> R. Posner, *The Problems of Jurisprudence* (1993), at 161, 197–203.

The law of nations, for Benton and Ford, gradually became international law 'far away from law school and halls of diplomacy, in the course of mundane jurisdictional disputes arising in and on the boundaries of empire' (at 5). Benton and Ford note that Vattel made no difference between states and empires in his analysis. All the European states cared for was an entry into the club called the family of nations. The authors challenge the account where 'European jurists, with an occasional cameo appearance by Americans and jurists from other regions, carry the story's plot and exhaust its twists and turnings'. Paradoxically, the history of international law, Ford and Benton tell us, 'advances by receding as a topic'. We are asked to 'look away from international law and international lawyers and toward the process of international legal change' (at 18).

By 'jurisdictional imperialism', they refer to the gradual extension of jurisdiction of the British law to extra-imperial spaces. Such an extension of jurisdiction was occasioned by political and administrative disputes in colonies. Court decisions and arguments for better management of colonies allowed the British Empire to regulate extra-imperial spaces. On their part, colonial subjects sought the protection of British law. Understandingly, *Rage for Order* takes an ontological – even subaltern – turn in that it emphasizes the role of convicts and judges, slaves and masters and colony and metropolis in equal measure. They reject those who argue 'British resolve and British control' to prohibit slavery using bilateral treaties and mixed commissions as a humanitarian project. Indeed, slavery certainly was not viewed as a 'crime against humanity' at the time (at 20).

Benton and Ford find that 'empire framed visions of global order much more than references to natural law principles or to Vattelian visions of sovereignty, in dimensions far beyond the articulation of a standard of civilization from which certain colonial peripheries were tidily excluded' (at 21). Therefore, they do not mine 'interventions in a search for the origins of international legal norms or doctrines'. Rather, they examine 'the intricacies of the regional system of states and of the oceanic order projected by British agents' (at 24):

In the British Empire, the imperial constitution and its myriad sources addressed questions of global significance, such as the legitimate conditions for the acquisition of colonial territory or the way British law extended to extra-imperial spaces. ... Circulating colonial schemes and local debates did draw on often vague and occasionally precise understandings of jurists' positions on the law of nations, but colonial legal politics also produced new and powerful frameworks with an unstable relation to jurisprudence. Meanwhile, the judgements of admiralty lawyers, or other case-related commentary on particular controversy, were offered up as substitutes for disquisitions on the law of nations, while corresponding more closely to the pressures and demands of imperial politics (at 21).

Chapter 2 tells an important story. In the early 19th century, the governance of colonies remained an important political question in Britain. Parliamentary oversight of colonies had begun after the Crown lent money to the East India Company to recover from losses due to the Indian famine. In the island of Trinidad, however, colonial governors asked for more Crown powers over British court or parliamentary jurisdiction (at 28–29). This call for more executive power allowed despotic and brutal colonial governors – Colonel Thomas Picton, for example – to be seen as controlling the lawlessness of colonial subjects using 'extensive crown powers'. Although the abolitionists and their allies agreed with the critique of colonial rule championed by Edmund Burke and Jeremy Bentham, they initially rejected the latter's emphasis on 'parliamentary oversight' in favour of Crown powers. Nevertheless, after the French, American and Haitian revolutions, the restraining of colonial despotism using Crown powers did not appear jarring even to the abolitionists (at 29). The trials of Warren Hastings (1780s) and Picton (1810s) soon transformed into 'constitutional arguments about the relation of colonial to imperial authority and about the nature of imperial governance' (at 30).

Chapter 3 tells the story of John Austin, the Benthamite and other jurists commissioned by the British Empire. Austin was appointed to enquire into law and governance in Malta. The turn of the 19th century inaugurated a culture of commissions to investigate colonies (at 58). The project of ‘governmentality’ executed through commissioning inquiries in the colonies ‘produce[d] a coherent British imperial order of global proportions’ (at 59). Colonial investigations responded mainly to a perceived dearth of information necessary to effect the incorporation of the French, Dutch and Spanish colonies acquired by Britain from 1798 to 1815. Commissioners projected the Crown’s power in the colonies. By interposing themselves as the king’s emissary, the commissioners sat between disaffected colonists and colonial bureaucracy that included judges and magistrates. At last, imperial order emerged from the review of legislations, the redesigning of colonial legal bureaucracies and the inquiries by a committee of curious lawyers (at 84). Austin was important in that he, for the first time, began to fashion the empire as ‘a field of sovereign command’ while rejecting certain dicta of British judges (at 79). Austin’s essential argument was that the sovereignty of the empire meant not the protection of liberty ‘but to govern colonial peoples according to law and in the interest of the empire writ large’ (at 80).

Chapter 4 tells the story of ‘legal meddling’ when the East India company signed treaties with states that ceded control over external affairs in exchange for protection by the Company. This led to the creation of an office of ‘protector’ in the existing English institutions (at 89). Instead of flowing from ‘universal rights’, protection offered by British officials of the East India Company to native kingdoms ‘served to reinforce the legitimacy of British imperial jurisdiction’. Although hardly liberal, we are told, the protection policy of the British ‘was also much more than purely authoritarian’ (at 116).

While much of Chapters 2, 3 and 4 analyse the liberal project of anti-slavery and abolitionism, Chapter 5 puts the regulation of piracy at the core of British imperialism. The British navy had emerged stronger, if also overstuffed, after the Napoleonic Wars. Stopping slavery or fighting piracy was to form ‘the linchpin of new oceanic jurisdictions’ of Britain’s imperial designs (at 118). Benton and Ford reject the traditional argument to argue that ‘neither the campaign against slavery nor efforts to curtail piracy derived clearly from the law of nations’. Piracy jurisdiction in the 19th century was a ‘crude assemblage’ as ‘even attacks on foreign territory could be presented as lawful preventive measure against piracy’. The uncoordinated machinations of the Foreign Office ‘reflected naval power and produced imperial constitutional commentary [and] parliamentary politics’ (at 121).

Chapter 6 discusses regional systems and their role in delivering to us the idea of nation states. Even as regional governments seeking self-determination sought British protection, they did not intend to lose sovereignty. Essentially, in Latin America, polities presented themselves as a regional unit with ‘an array of states act[ing] together as the guardians of commerce’ (at 178). When such matters became a subject of litigation in American and British courts, the ability of a particular rebellious group to wage war became a question of ‘international law’ and ‘sovereignty’ (at 178). This was to give rise to not just ‘new nations but to new regional orders’ (at 179).<sup>15</sup>

The final chapter completes the narrative of *Rage for Order* by telling the story of John Westlake, the famous jurist. The 19th-century jurists are not seen as agents of promoting international law. Arguably, had they done so, they would have awarded sovereignty to

<sup>15</sup> In the 20th century, this model was to return in Japanese imperialism with improved software where the tendency was to form ‘a regional (geographically dispersed) bloc’. While benefit to the metropole continued to be the rationale for domination, benefit did not necessarily derive from transferring primary wealth to the metropole but often entailed ‘the industrialization of the puppet- or client-state’. Duara, ‘The New Imperialism and the Post-Colonial Developmental State: Manchukuo in Comparative Perspective’, 4 *Asia-Pacific Journal* (2006) 2.

native states.<sup>16</sup> Benton and Ford tell the story of Manipur in India. After the pro-British puppet king of Manipur was killed, the British had to manufacture logics for intervention given they had no criminal jurisdiction in Manipur at the time. John Westlake, the international lawyer, was the last straw that broke, as it were, the back of the camel called international law in the princely India. He said international law has no bearing upon the relationship between the Presidency India – therefore, the British queen – and the princely India that are ‘under the suzerainty of Her Majesty’. However, this should not, we are cautioned, be seen as ‘a story of gradually fortifying imperial authority’ (at 187–188). The ‘standard of civilization’, *Rage of Order* tells us, ‘served as a blunt tool for characterizing non-Western societies as outsiders that could join the international legal community only when Western powers deemed them to be sufficiently civilized’ (at 188).

In the account given by Benton and Ford:

[in] campaigns against slave traders and pirates, British officials and jurists sometimes referred to natural law principles, but they acted on the basis of a combination of municipal law, treaties, vaguely defined (and often aspirational) customary usages, and assertions about a British right to intervene that itself derived largely from imperial contexts (at 190).

They argue against the conventional grain that international law is a history of what publicists said it was. Rather ‘regional formations deserve our attention as powerfully formative forces in the history of international law’ (at 190).

Admittedly, *Rage for Order*’s shift of attention ‘away from a search from the origins of principles of international law in the nineteenth-century to an account of constitutive patterns of global legal politics, including imperial jurisdictional imperialism’ is not trivial at all (at 25, emphasis added). This reorientation rejects some historians’ long-standing ‘claims about the British Empire’s role in global political and legal change’ (at 191). Soon, global order became an end in itself, allowing empire to span domestic and interpolity spaces on its own terms (at 195). In this project, the empire was assisted by its built-in structure of legal pluralism, its adaptive jurisdictional strategies and its eager openness to the acquisition of new territories and subjects (at 195). Very notably, unlike lawyers, Benton and Ford note the direct lack of a connection between juristic outpouring and the expansion of international law. The disconnection between history of law and lawyers’ version of the history leads them to observe that some amount of ‘alchemy’ has been involved in offering a narrative of international law in the late 19th and 20th centuries based on writers and judicial decisions (at 121). For them, the growth of international law is not a top-down story. Empire, its subjects and various interlocutors have all played a role in international law’s universalization. Benton and Ford maintain that international law’s universalization, as it were, is more piratical than juristic.

### 3. Fitzmaurice: *Sovereignty, Property and Empire*

Fitzmaurice’s *Sovereignty, Property and Empire* addresses the relationship between property, sovereignty and occupation. While Chapters 1–6 discuss occupation in Roman law, the Salamanca School and other medieval discourses, Chapters 7–11 discuss occupation in the 19th century – *terra nullius* in the polar regions and *territorium nullius* in Africa. The book is admirably

<sup>16</sup> Sir William Lee-Warner, *The Native States of India* (2nd edn, 1910), at v, noted: ‘No part of the complicated task entrusted to the British Government in India demands more patience and tact than that of securing the co-operation of the Native states in promoting the moral and material welfare of the Indian Empire.’ Legg, ‘An international anomaly? Sovereignty, the League of Nations and India’s princely geographies’, 43 *Journal of Historical Geography* (2014) 96–110.

exhaustive in its coverage of sovereignty, occupation and empire. Fitzmaurice tells us that the debate on the relationship between property, sovereignty and occupation began in medieval law. Theologians, philosophers, publicists, jurists and colonizers all debated the issue. Key to understanding the relationship between property and empire is ‘the link between the idea of occupation and economic progress’ (at 2). It was natural, therefore, that European writers on politics ‘sought ways to reconcile theories of politics with commercial life’ (at 3). Modern authors rejected the moribund justification of property and ownership as control while replacing it with the idea that ‘occupation was only achieved by *use*, or, in Locke’s terms, improvement’ (at 3).

Fitzmaurice looks at the precise relationship between property and empire in the history of international law from the lens of occupation. While the doctrine of occupation has had a significant role to play in the expansion of colonialism, just how occupation occurred is not that obvious. In medieval Europe, ‘occupation remained primarily a tool of legal and political discourse’ (at 2). Later, European colonists found the ‘link between the idea of occupation and economic progress’ a useful explanation for expansion (at 2). In any event, European political theorists increasingly ‘sought ways to reconcile theories of politics with commercial life’.

Fitzmaurice begins his narrative by recalling David Hume. Hume was first to recognize that in the 17th century thinkers began to see economics as an ‘affair of state’. The 16th-century Salamanca School ‘was used to examine economic as well as political and legal questions’. John Locke and Adam Smith both used the idea of occupation ‘to explain the historical progress of human sciences from a hypothetical state of nature to an agricultural state’ (at 3). For Locke, an occupied land could be transferred into the realm of ownership by use and improvement. Occupation and exploitation gave people ‘superior and particular rights’. Gradually, Europe grew from an agricultural society to a commercial society. Thus, during the 17th and 18th centuries, European philosophers and historians ‘sought ways to overcome the neo-Roman fears that wealth was a cause of corruption’. This led Montesquieu to argue that ‘the danger to civil society was not commerce, but the martial cultures that were needed to maintain the large landed empires’ (at 5). Inspired by the Treaty of Westphalia and the expansion of European empires, which were more political than commercial, has led ‘to controlling other peoples’ land, labour and capital rather than supplanting or exterminating them through colonization’ (at 6).

Fitzmaurice establishes the relationship between Samuel von Pufendorf, Jean-Jacques Rousseau and Hugo Grotius rather clearly. He does not identify a clear break between early modern continental empires and post-Enlightenment commercial empires. In the 17th century, Pufendorf rejected the idea that sovereignty could be occupied while limiting occupation to only property. Instead, Rousseau argued that even sovereignty could be occupied by capture after defeats in war. Essentially, the question was whether occupation could result in legitimate property and, eventually, in sovereignty. Rousseau reached back to Grotius who had developed the theory of the occupation of sovereignty ‘partly in relation to his works for the Dutch East India Company’.

The doctrine of occupation was ‘constantly shifting between property and sovereignty’ (at 6). This theoretical oscillation had the European jurists argue that territorial sovereignty could be established where ‘sovereignty had not already been “taken”, including over the “personal” sovereignties of Africa and Asia’. And such an understanding was tied to the idea of ‘unequal treaties’ in that a treaty would function as an evidence of having obtained sovereignty (at 7). Indeed, Fitzmaurice sees the Berlin conference as more accurately representing the political situation that ‘recognized practices of extraterritoriality and informal empire that Europeans and Americans had employed in China, Africa and the Levant since at least the 1830s’ (at 28).

In an environment where the informal empire was to get a legal justification, the Latin doctrine of *terra nullius* was to play a key role (at 51). The historians of empire put a high premium on *res nullius*. From Roman law to the Salamanca School, *ius gentium* seemed to have given central importance to *res nullius*. Since the very start, *res nullius* was pregnant with *terra nullius*. The doctrine of *res nullius* sheds a fair amount of light on the relationship between state and empire

in early modern Europe as the Roman Empire used *res nullius* to justify the annexation of new territories (at 53–58).

Chapter 3 records the popularity of the Salamanca School in England. The Salamanca School's main contribution was to evaluate the position of colonized people with the lens of *occupatio*. The Virginia Company and its use of the Salamanca philosophy make for an interesting story (at 61–64). The Salamanca writers had offered probably the most extensive early modern consideration of the legality of colonialism (at 61). This came to be more than handy to the promoters of the Virginia Company. Besides, Francisco de Vitoria had clearly established indigenous rights to land. After much deliberation, the council of the Virginia Company found it expedient not to press for a clear title on colonial land (at 65). As a result, the English devised another justification for colonization. They said that in situations where a territorial ownership through conquest was not a possibility on native lands, 'they had a right to enter the lands of the Indians for trade and to defend themselves in that situation if necessary' (at 70). Anyhow, European companies were able to overturn rights that natural law had given to the native people by the use of political, and not philosophical, arguments (at 83–84).

Chapter 4 on occupation and convention discusses Grotius, Hobbes, Locke and Pufendorf, with Grotius taking the lion's share of discourse. Given Grotius' reputation as the father of international law, this is understandable. In particular, this chapter presents the views of Grotius, Hobbes, Pufendorf, and Locke on property, empire and occupation (at 87–124). While Grotius' views on open sea – *mare liberum* – is well known, Fitzmaurice brings to the fore aspects of Grotius' view on property that are not commonly known to international lawyers. In *de Indis*, Grotius argued that 'private property was first gradually established through use' and that this 'was a legal recognition of the natural law right of occupation' (at 93).

Grotius revised his theory of property 13 years later in his *On the Law of War and Peace*.<sup>17</sup> Before property could be taken for use, Grotius said, a kind of consent through a compact express or implied was necessary (at 96). Both Hobbes and Pufendorf followed this. By applying the Roman law of occupation, in *Mare Liberum*, Grotius declared the sea to be a common space because it could not be occupied like land (at 97).<sup>18</sup> A significant point that is absent from Hobbes' account of property, but present in the accounts of Grotius, Pufendorf and Locke, is 'the understanding of occupation as an act of self-preservation and therefore as a right of expansion'. Pufendorf very explicitly wrote that self-preservation pushed people to create a contract to form a civil society (at 105).

While occupation, labour and improvement could withdraw property from the common to make it a private ownership, the consent of that withdrawal must exist in the form of a contract. Pufendorf saw Vitoria as an apologist for colonialism (at 114). Locke extended the ideas on property by saying that the mixing of individual labour in private property adds value and the more we work on the property exclusively the ownership and value appreciates (at 119). Thus, Locke disagreed with Pufendorf that property is created by occupation for 'the protection of property was precisely the reason we need to make agreements' (at 121). Very importantly, while all of these theorists put land at the centre of their theory of property, Roman law from which they drew the idea of occupation 'makes no mention of land' (at 123).

Chapter 5 discusses William Blackstone and common law (at 166). Given its common law traditions, not many assume that civil law in England had any role in shaping the British position on international law. Yet civil law practice before ecclesiastical and admiralty courts in Britain in the long run would offer a platform for the development of the law of nations (at 167). Blackstone, a monumental figure, had a key role to play in impregnating common law in Britain with civil law. In the Roman law tradition, for Blackstone, 'true ground and foundation for all property' is occupation (at 168).

<sup>17</sup> H. Grotius, *On the Law of War and Peace* (1625).

<sup>18</sup> H. Grotius, *Mare Liberum* (1609).

Chapter 6 deals with the American Revolution, occupation and international law. Chapter 6 investigates the *Mohegan* case (at 173–182) and the case of *Oregon Territory* (at 203–214).<sup>19</sup> The *Mohegan* case between colonists and Native Americans brings out the true application of Locke's theory of occupation and ownership. Next, in the debate between Vattel and Locke over the Oregon territory, the *Mohegan* case was used as a precedent.

In Chapter 7, Fitzmaurice tells the story of civil law in England, again (at 229–239). The story begins with the rise of nationalism in Europe. Nationalism gave way to positivism. Natural rights for Bentham, John Austin, Karl von Savigny, Henry Sumner Maine and John Westlake were to be understood 'in the context of positive law and therefore within the boundaries of the nation state' (at 217). However, in Britain, civil law received a new lease of life due to admiralty and ecclesiastical courts using the civil law. For example, it was in the admiralty courts that civil law was applied in maritime matters. Thus, much of the law of prize in war in British courts – which became international law subsequently – was civil law of Roman law origins. Robert Phillimore and Travers Twiss were the most prominent British civil lawyers of the time (at 230–231). Chapter 8 discusses *res nullius* and the idea of sovereignty.

The book climaxes with a discussion of two distinct, but often conflated, concepts of *terra nullius* and *territorium nullius* in Chapters 9, 10 and 11 (at 284–334). Building on the rigorous debate on occupation since the 14th century, Fitzmaurice delivers the most important lesson of the book here. German professor Ferdinand Martitz had been tasked by the Institut de droit International to identify the core legal principle regarding the occupation of Africa in the Berlin Conference. For Martitz, it was territorial sovereignty and not property ownership that held the key to 'the measure of whether colonial occupation was possible'. It was at this point that Martitz used *territorium nullius* – a term fresh in international law if only because 'it had not been used to discuss colonisation prior to this point'.

The debate at the Institute exposed the fault line between 'pro and anti-imperial views amongst jurists over the scramble for Africa in the 1880s' (at 285). The essence of *territorium nullius* is that, irrespective of inhabitation or a lack thereof, a lack of centralized sovereignty would open the territory for colonization. The savages and barbarians, if you will, had no sovereignty despite occupation and ownership. In other words, *res nullius* only meant a 'rule of property'. In conclusion, while the African populace had veritable property in the land they inhabited, they had no sovereignty over it (at 286). In such ways a distinction between private 'property' rights and public 'sovereign' control was born. Such a sharp divide between private and public meant that African peoples could cede their private *territorium nullius* through treaties in favour of European occupation and sovereignty of a public nature. To such a ceding, as Twiss had argued, a treaty as evidence was necessary (at 287).

A crucial addition to our knowledge about *terra nullius* is the successful career the doctrine had in debates and disputes around the polar regions. *Terra nullius* became the fulcrum of the Norwegian defence in the *Eastern Greenland* dispute with Denmark at the Permanent Court of International Justice.<sup>20</sup> *Terra nullius* remained an *obiter dictum* in the *Eastern Greenland* case as evidenced by Charles Cheney Hyde's paper of 1933 on the case.<sup>21</sup> Nevertheless, for Hyde's students at Columbia University – Philip Jessup, James Simsarian, Arthur Keller, Oliver Lissitzyn and Richard Mann – *terra nullius* as a term owed its birth to the debates on polar regions (at 321–324). Thus, Fitzmaurice rightly corrects the oversight in the use of *terra nullius* in the environment created by decolonization.

<sup>19</sup> The *Mohegan* case is unreported with parts of the lands in issue subject of modern American litigation in *Mohegan Tribe v. Connecticut*, 483 F. Supp. 597 (D. Conn. 1980); *Oregon Territory*, found in Sir Travers Twiss, *The Oregon Territory, Its History and Discovery ... an Examination of the Whole Question in Respect to Facts and the Law of Nations* (1846), at 13.

<sup>20</sup> *Legal Status of Eastern Greenland (Denmark v. Norway)*, 1933 PCIJ Series AB, No. 53, at 22.

<sup>21</sup> Hyde, 'The Case Concerning the Legal Status of Eastern Greenland', 27 *American Journal of International Law* (1933) 732.

In particular, he notes that the Lebanese judge in the *Western Sahara* advisory opinion at the International Court of Justice wrongly conflated ‘*terra and territorium nullius*’.<sup>22</sup> Going by the distinctions the European scholars had made in Berlin between the two concepts ‘the Western Sahara had not been *terra nullius* because the term had not been employed to justify colonisation and, rather, treaties had been used’ (at 327). In the post-war world, Fitzmaurice concludes, *terra nullius* became a synonym for all kinds of occupation – even conquest – by sacrificing both the very many ways in which Europe had colonized the world and the distinction European scholars had created between *territorium nullius* and *terra nullius*.

#### 4. Critical Evaluation

*Sovereignty, Property and Empire* is everything that *Rage for Order* is not. The two books on the same issue – empire and international law – could not be more contrasting in approach and conclusions. A thoroughly original approach – one that takes a noted subaltern turn – is bound to make *Rage for Order* an instant classic in international legal scholarship. *Rage for Order* corrects an important oversight, even myopia, in international legal scholarship. Much of the new production of scholarship in the discipline oscillates between hagiography and the critical assessment of publicists. The rest seem to be writing a parallel history of international law in their region or jurisdiction. Upending such worn-out accounts, though limited to British imperialism, *Rage for Order* very persuasively finds convicts, abolitionists, slaves, colonial administrators and British courts as equally significant actors in the production of international law. *Rage for Order* is as novel as it is original in methodology and findings.

By contrast, Fitzmaurice presents the story of international law and empire as the story of occupation supported by European scholars. That essentially is the history of medieval and modern Europe. Will the study of late antiquity upend a medieval story of occupation? Recent historical studies suggest that from the 7th through to the 16th century, it was not occupation but, rather, treaties and pacts – international law’s primary source – made between the Romans, the Persians and the Arabs after defeats in wars that created empires.<sup>23</sup> In that sense, reading Fitzmaurice suggests that the establishment of the colonial companies was the decisive moment in the life of *occupatio* as a doctrine of political importance. As violence erupted among the Europeans during the 30 years of war, a previous international order based on peace treaties between Roman Christians, Arab Muslims, Persian Zoroastrians, and Khazar Jews gradually gave way to the doctrine of occupation.<sup>24</sup>

Much like today, Russia stood right in the middle of the East and the West. The Vikings had begun to visit ‘the markets around the Caspian Sea and Black Sea, active in the trade of wax, amber and honey as well as fine swords’.<sup>25</sup> The Vikings *rus, or rhos*, from Scandinavia were to become the fathers of modern Russia. In many ways, the Vikings had prefigured, even heralded, the European era of occupation over the older order based on Roman *pacta sunt servanda*. In this sense, the story of international law as ‘first in the West, and then elsewhere’ comes about due to the focus on *occupatio* alone. The study of treaties made in late antiquity challenges, even reverses, this viewpoint.

Contrarily, *Rage for Order* presents the story of international law in two phases. First, international law in England during the 19th century, as evidenced by the recourse of the British admiralty court, typifies its Roman parentage and civil law traditions. Second, when Britain became empire on the wings of its colonial company, Roman law helped the British courts to expand its jurisdiction to exotic subjects and new territories. As discussed before, the 21st century is a veritable spring of a ‘new turn to history’ of the law of nations. The new turn to

<sup>22</sup> *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports (1975) 12, at 83.

<sup>23</sup> P. Frankopan, *The Silk Roads: A New History of the World* (2015), ch. 5 ‘The Road to Concord’.

<sup>24</sup> *Ibid.*, at 243.

<sup>25</sup> *Ibid.*, at 115, 116.

his(stories) – in comparison to (her)stories – of international law seeks to get rid of the historicism that Chakrabarty speaks of.<sup>26</sup> A first observation is that this history is mostly descriptive, moving back in time as we find contemporary scholars writing, among others, European, Latin American, Islamic and other histories of international law.<sup>27</sup> As Anne Orford says, the ‘turn to description as a mode of legal writing might be a productive move at this time’.<sup>28</sup> In that sense, Benton and Ford are, potentially, a methodological bull in the China shop of facts and descriptions of regional histories that international lawyers are running.

Colonialism and semi-colonialism are now central to the history of the world. But ‘order as an end in itself’ made colonialism international law’s *obiter dictum*. Antony Anghie has challenged that proposition.<sup>29</sup> Although some accuse international lawyers of practising presentism – interpreting past events in contemporary values – we are witnessing, finally, colonialism, the *obiter dicta* of the law of nations, turning into the *ratio decidendi* of international law today. Moreover, between the many lenses that claim to accurately present the story of international law’s universalization, *Rage for Order* presents a manifesto of the origins of a global law in an ontological fashion (at 197). Future works on the history of international law should not be written without engaging the *Rage for Order*. *Rage for Order* and *Sovereignty, Property and Empire* are the physical manifestation of an ongoing dialogue about the true story of international law’s expansion – or, as lawyers put it, ‘universalization’ – to the non-European world. The two books should be kept on the opposite ends of the international lawyer’s shelf.

Prabhakar Singh

Associate Professor, O.P. Jindal Global University, Sonapat, India

Email: [prabhakarsingh.adv@gmail.com](mailto:prabhakarsingh.adv@gmail.com)

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<sup>26</sup> Although Benton and Ford already improve upon lawyerly works on international law’s history, the story that, e.g., female convicts in colonies could say is often best left to novelists. See A. Ghosh, *Flood of Fire* (2015). However, even a male novelist’s narration of a female run-away could be questioned. Ratna Kapur, ‘Gender, Sovereignty and the Rise of a Sexual Security Regime in International Law and Postcolonial India’, 14 *Melbourne Journal of International Law* (2014) 317, at 322 speaks of international law perpetuating ‘a neoliberal political rationality that contains, disciplines and manages the potential for gender disruption’.

<sup>27</sup> Consequently, can the subaltern speak remains by far the most serious issue in armchair expansion of international law’s histories. Thus spoke Chimni of six visions from India. Chimni, ‘Alternative Visions of Just World Order: Six Tales from India’, 46 *HILJ* (2005) 390, 400. Prabhakar Singh, ‘Indian International Law: From a colonized apologist to a subaltern protagonist’, 23 *LJIL* (2010) 95 added a seventh ‘tribal’ tale. Asian sea tribes further challenge the imperial-territorial bias in the law of the sea principle of ‘land dominates the sea’. Singh, ‘Vernacular Nations’, 51 *Economic and Political Weekly* (2016) 24. Who speaks Latin American international legal history? Indigenous people, or European settlers? See de Oliveira Franco, ‘Oportunidades e desa os das TWAIL no contexto latino-americano a partir de perspectivas dos povos indígenas ao direito internacional’, 12 *Brazilian Journal of International Law* (2015) 227. Since 15th century, ‘the Ottomans had been part of the concert of Europe through wars, alliances, treaties and economic relations with the European states.’ M.S. Palabiyik, ‘The Emergence of the Idea of ‘International Law’ in the Ottoman Empire before the Treaty of Paris (1856)’, 50 *Middle Eastern Studies* (2014) 233, 247.

<sup>28</sup> Orford, ‘In Praise of Description’, 25 *LJIL* (2012) 609. The argument is more complex than this description captures. Dworkin, ‘In Praise of Theory’, 29 *Arizona State Law Journal* (1997) 353, 364.

<sup>29</sup> Anghie, *supra* note 2, 2–3.