The second aspect concerns the description of the history of international law. As we have confirmed, there existed extra-European systems regulating the relations among the bodies politic in each region. This is ''the point of departure.'' If we are asked whether or not international law as we know it is Euro-centric, the answer is simply affirmative. Yet international law is the sole unified body of legal norms regulating the relations among current states. There no longer exist alternative bodies of legal norms as such. All alternatives which existed before the European expansion have ceased to exist. In each region except Europe, we can find ''a lost future'' regarding the norms regulating relations among bodies politic. This, however, does not mean that extra-European experiences have no relevance to the history of international law. The disappearance of alternative bodies of rules formed ''the point of no return'' for the history of international law. Since then, we have a singular body of international law.[3] The Euro-centric story of international law is not wrong as a description of history.

Having answered the original questions, I would like to expound upon my view concerning ''the Euro-centric story of international law.''

The importance of the idea of Euro-centrism itself cannot be overestimated. It helps us to unveil our unconscious presuppositions in understanding and explaining many social and scientific issues. It surely helps us to relativize the Western values which dominate our global society. The same has been argued in the field of international law in order to criticize its intrinsic and ideological character, and the so-called ''inter-civilizational approach'' to, or ''trans-civilizational perspective'' on, international law has made a contribution to opening the way to a new construction of current international legal norms. Moreover, it cannot be denied that the expansion of international law was accomplished with the help of armed forces in the name of ''civilization.''

We should, however, be careful not to confound legal arguments with politico-economic claims and not to blur the line between the positive rules of law (lex lata) and the desirable rules of law (lex ferenda). There may be different constructions of a positive rule of international law, and the difference may be caused by the political intentions of the states concerned. The possibility of different constructions is unavoidable due to the fact that the rules of international law are normally ambiguous and thus tend to invite different constructions.[4] It should nonetheless be clarified that, in case a state claims different rules of international law (for example, different international human rights standards) based on the civilization to which it belongs, what we should consider is whether the claim is admissible in light of positive legal norms, not in light of civilization.

Redefining European Tradition

By Iain Scobbie[*]

The history of international law is often seen as an account of rules developed by European states since the sixteenth century. The notion that international law has been a vehicle for

[3] This fact suggests that the notion of ''multipolarity,'' implied in the current criticism of Euro-centrism, would not be appropriate to the analyses and discussions which have some concern with the present status of international law.

[4] But this is not a particular issue of international law, since any law requires interpretation. The only difference between international law and municipal law in this respect is that the latter normally has a system that holds authority to decide which interpretation is correct and to enforce the decision, while the former does not.

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the transmission of Eurocentric values, or for the pursuit or entrenchment of European interests, is commonplace. Dupuy notes that this complaint was raised during the decolonization process when new states were expected to accept the existing content and structure of international law, in whose formation they had not participated.[1] This was neither the first nor the last time this criticism has been made and alternative visions proposed, as the work of Alejandro Álvarez[2] and Tony Anghie[3] among others attest. I shall argue that although international law is genetically European, the spatial nature and control of its principal actor, the state, has developed in a way which could never have been contemplated in Europe.

It is undeniable that law embodies values and interests, but the premise the Eurocentric argument seems to assume is contestable—namely, that there is some monolithic entity labeled ''Europe.'' This assumption begs too many questions. If it is meant as an historic argument, it ignores periodization.[4] It ignores the plurality of different European traditions in international law scholarship and practice. It ignores that different European states have had, and have, different concerns and interests which can and do conflict. It ignores the thorny question of who counts as European. Is Russia part of the ''European'' history of international law and, if so, are we including Russia from the Baltic to Vladivostok, or only part of it? But which part? Russia also displays the problems of periodization and practice. Are we focusing on the Russia of Fyodor Martens or the USSR of Grigory Tunkin, and if the latter, is that pre- or post-peristroika Tunkin?[5]

''Europe'' is simply a difficult idea to pin down. There is a vast difference between the Europe of the European Union and that of the Eurovision Song Contest. One commentator noted that at the inaugural conference of the European Society of International Law, many of the papers started by expressing uncertainty as to what Europe is.[6] We should be honest. When we talk about the ''European'' history of international law, we are really talking about the impact of colonialism and empire on international law since the sixteenth century.[7] We are not talking about, for instance, the impact of Liechtenstein (despite Nottebohm), Luxembourg, or San Marino.

Possibly the most lasting European legacies are structural; for example, that international law is a post-Enlightenment secular rational system. It is a system of positive law, rather than one of theological natural law. But perhaps the most apparent aspect of European influence is that we live in a world of states—''notions of State and sovereignty [are] the key architectural features of international relations, whose existence from the Peace of Westphalia onwards is taken to be both 'given' and historically 'constant.'''[8] Europe successfully exported its tradition of the territorial sovereign state, which remains the primary actor and bearer of values in international relations. This is an anathema to theorists such as Philip Allott:

[1] Pierre-Marie Dupuy, *Some Reflections on Customary International Law and the Appeal to Universal Values: A Response to Martii Koskenniemi*, 16 EUR. J. INT'L L. 131 (2005).

[2] *See, e.g.,* Alejandro Álvarez, *Latin America and International Law*, 3 AJIL 269 (1909).

[3] *See, e.g.,* ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2005).

[4] *See, e.g.,* Oliver Diggelmann, *The Periodization of the History of International Law*, *in* THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 997 (Bardo Fassbender & Anne Peters eds., 2012) [hereinafter OXFORD HANDBOOK].

[5] On Russia, see, for example, Lauri Mälksoo, *Russia–Europe*, *in* OXFORD HANDBOOK, *supra* note 4, at 764.

[6] Gerald L. Neuman, *Talking to Ourselves*, 16 EUR. J. INT'L L. 139, 141 n.3 (2005).

[7] For an overview of relevant concerns, see Matthew Craven, *Colonialism and Domination*, *in* OXFORD HANDBOOK, *supra* note 4, at 862.

[8] *Id.* at 864.

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> The state (public realm under the authority of a government) having developed as a way of internally organizing a certain sort of society . . . came to be conceived also as the external manifestation of the given societies. The state was turned inside out, like a glove. The governments of the statally organizing societies recognize in each other that which is *state*, not that which is *society*.[9]

The conduct of international affairs through state-centered mechanisms had the result that sovereignty, which projects ''an authority-based view of society,'' became the structural premise of international affairs. This:

> tend[s] to make all society seem to be essentially a system of authority, and . . . to make societies incorporating systems of authority seem to be the most significant forms of society, at the expense of all other forms of society, including non-patriarchal families, at one extreme, and international society, at the other.[10]

The exportation, and imposition, of European notions of state and sovereignty foreclosed other options for international organization. International society became ordered around the state, rather than, for instance, some more cosmopolitan arrangement. But the irony is that the spatial powers of the state have now been extended well beyond the European notion. The late David Bederman noted that the development of the law of the sea has often been tied to the pursuit of European interests in trade and empire,[11] but there is an irony when we consider that ideas rejected by European states in the seventeenth century regarding the control of maritime spaces are now reflected in the law of the sea.

While the terrestrial aspect of state authority has remained robust, the restrictions on the exercise of state power at sea which European states started to develop in the early seventeenth century or thereabouts have been attenuated. What we have is the European land model of the state, but not the maritime. Moreover, there is room to argue that the current organization of the state's maritime spaces simply could not have developed in Europe.

Leaving to one side some aspects of the law of neutrality, from the seventeenth century there developed a consensus about matters such as freedom of the high seas and the nature of the territorial sea, although there were points of divergence, such as the maximum permitted breadth of the territorial sea—a disagreement which contributed to the failure of the 1930 Hague Codification Conference. In the inter-war period, some proposals for change were discussed by learned societies, such as the Institut de Droit International, the International Law Association, and the Harvard Research program, but real change started to come about in the mid-twentieth century. An early and prominent development was the 1945 Truman Proclamation on the Continental Shelf.[12] This was a clear example of the formulation of a claim in a desire to secure access to resources.[13] The Declaration stated, in part:

> it is the view of the Government of the United States that the exercise of jurisdiction over the natural resources of the subsoil and sea bed of the continental shelf by the contiguous nation is reasonable and just, since the effectiveness of measures to utilize or conserve these resources would be contingent upon cooperation and protection from the shore . . .

[9] Philip Allott, Eunomia: New Order for a New World 243, para. 13.105(1) (1990).

[10] *Id.* at 200, para. 12.54.

[11] David Bederman, *The Sea*, *in* Oxford Handbook, *supra* note 4, at 359, 360–61, 366–71.

[12] Proclamation 2667—Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf (Sept. 28, 1945), *available at* http://www.presidency.ucsb.edu/ws/?pid=12332.

[13] On the formulation of U.S. policy on continental shelf resources and coastal fisheries, see 2 U.S. Dept. of State, Foreign Relations of the United States, 1945, *General: Political and Economic Matters*, 1481–1530.

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It did not state a seaward limit for the claim, but an accompanying press release stated that this would be at the 100 fathom isobath.[14] The Truman Proclamation concluded that:

> [t]he character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.

The same cannot be said for some of the declarations inspired by the Truman Proclamation, particularly some Latin American states' claims to epicontinental seas, which asserted rights not only to the resources of the seabed but to the superadjacent waters and living resources, with Chile being the first to claim national sovereignty over a 200-nautical-mile maritime zone in 1947.[15] In time these claims would become the basis for continental shelf and exclusive economic zone doctrine as these are now embodied in the 1982 United Nations Convention on the Law of the Sea. A similar development can be seen in the claims made by mid-ocean archipelagic states to jurisdiction over, and regulation of navigation through, archipelagic waters.[16]

Undoubtedly these claims had much to do with the desire to control maritime resources, whether living or non-living. But these claims to extensive maritime areas could not have been made by most European states, as the majority of them are locked, one way or another, by the maritime claims of neighboring states. What we are left with is divergent accounts of spatial control by the state. The European tradition was one of control over land territory and over only a narrow maritime band, subject to the exercise of innocent passage by other states, while establishing freedom of fishing and navigation on the high seas. The control over a state's land territory remains, but its control over adjacent maritime areas has greatly increased in both substance and, where possible, geographical extent—and this could not have arisen in Europe because, quite simply, the space is not there. The contemporary delimitation of maritime space has thus been driven by the interests of non-European states which are more favored by geography.

The content of international law is driven by the concerns of those who can make it. But to say that the history of international law is a history of Eurocentricism is simply to underline a matter of historical contingency which is perhaps becoming less accurate in matters of substance, although a clear structural influence remains. Nevertheless, these structures are not immune from reconsideration and reformulation.

[14] Press Release, President Harry S. Truman, Proclamation 2667—Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf (Sept. 28, 1945), *at* http://www.presidency.-ucsb.edu/ws/?pid=12332.

[15] For a summary, see DAVID JOSEPH ATTARD, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW 3–9 (1987).

[16] For an early formulation of these claims, see D.P. O'Connell, *Mid–Ocean Archipelagos in International Law*, 45 BRIT. Y.B. INT'L L. 1 (1971).

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