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INTERNATIONAL LEGAL THEORY

Introduction to Symposium on the Trajectories of International Legal Histories

Doing Things Differently There

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International law is in the midst of a heavily advertised historical 'turn' (I hereby retire this word). The past, it turns out, is always close behind, or, perhaps, ever-present. But how long have we been aware of this? Some date this interest in history to 1603, others (Matt Craven, comes to mind) to Robert Ward or to the re-publication of the Spanish School by the Carnegie Foundation and James Brown Scott in the early twentieth century, or to David Kennedy's capacious, formative, late twentieth century essays.[1] Then there is the more recent revival, manifesting itself in edited collections, dedicated journals, monographs and so on.

Here, I think, we encounter something newish: a re-invigorated relationship with other cognate fields (intellectual history, political theory); an almost obsessive concern with historical method (people have more or less stopped taking an interest in telling us what happened in the past); a flat refusal to take previous histories at face value; a jamming together of method and politics ('interest precedes method' as Catherine Mackinnon once put it); and an urge to rethink history and the history of the field in light of North-South relations or the history of the Global South or, more conventionally, empire.

Most people I talk to seem convinced that this is either a dead-end or the best thing to have happened to international law for a long time. In any event, 'rightly or wrongly, or both' (as Peter Cook once said), some of our most able thinkers are engaged in the task of working out what histories of international law might be, or might become. This sub-field had become one of the places where a politics of international law is being played out. And this politics is vividly present in the pages of what has become one of the two or three leading journals in the field, *The Leiden Journal of International Law*.[2] In the pieces gathered here by Ingo Venzke and Eric De Brabandere, the editors of the journal, each essayist uses history

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[1] E.g., 'International Law and the Nineteenth Century: History of an Illusion', (1996) 65 *Nordic Journal of International Law* 385.

[2] When I first studied and taught international law, everyone read the *American Journal of International Law* and very few people read the *Leiden Journal of International Law*. I would not quite go so far as to say that the position has reversed but there has been a significant shift in the obscure hierarchies around these things.

to get into some sort of, sometimes adversarial, dialogue with her or his own sub-discipline.

One way to approach the problem of recounting international legal pasts might be to accept that there are simply manifold narrative strategies at hand. Felix Lange, for example, tells the story of *jus cogens* through a smorgasbord of three different narrative devices conforming to three historical moments and three institutional styles (the dark side of *jus cogens* in the inter-war period, a story of *jus cogens* as an effect of decolonization and in particular the non-Western scholars who became influential at the time of decolonization, and *jus cogens* as the culminating idea in the history of international law's move from bilateralism to collective or community interests). An agnostic, horses-for-courses, approach is, for him, the closest approximation to a complete historical story, one that is attentive to the dominant ideas and practices circulating at any one time in international legal history. This 'mediating' account (moving among and between different theories or understandings of what international law might be about, or for) will be too ecumenical for many people: are these ultimately three highly partial self-cancelling narratives or a supple effort to use the right tools for the right job?

Sometimes, narrative choice is a question of re-orienting (or, perhaps re-originating) the field towards something obscured or forgotten or under-rehearsed, sometimes it is a question of just noticing that histories are written not discovered. In Guy Fiti Sinclair's article, 'Towards a Postcolonial Genealogy of International Organizations Law', the origins of international institutions are reconfigured around a post-war moment that is also a moment of decolonization (this is something Lange does in his article here where he traces the development of *jus cogens* to the needs of the decolonization moment). Sinclair's counter-history is happy enough to dispense with Versailles or Geneva (or, for that matter, Vienna) as inaugural crises for the law of international organizations and instead points to the constitutive effects of a series of cases (*Certain Expenses*, *Reparations*, *South-West Africa*) and writings (many from African and Asian scholars – this idea of recuperating such writings is a feature of Lange's article too) through which a proper and general law of organizations began to evolve. This law has been understood as 'functionalist' (organizations received, or were deemed to have received, from the collectivity of states, the powers they needed in order to act on the world). As Sinclair shows, this law of international organizations appeared to operate in opposition to classic territorial imperialism. Indeed, as he notes, the continuing appeal of a functionalism many scholars and states profess to dislike can be partly attributed to its apparently anti-imperial emphasis and roots. But as he also notes, in a complicated but familiar move, this functionalism (grounded in sovereign equality) has come to mask subtler and more pervasive forms of domination still at large (and small) in the world.

These forms of domination are the subject of Julia Dehm's article (though here they are perhaps not so subtle), an article that nicely illustrates the critical edge counter-histories of international law might possess. The history of human rights now has a history of its own. The publication of a series of books and essays in the past decade has helped us rethink the origins of human rights and, in particular,

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their relationship to the economic order we now call 'neo-liberal'.[3] And alongside this has been a concern to rehabilitate failed projects of international re-ordering. For Dehm, as with, say, Samuel Moyn, the 1970s is a key moment in the history of international human rights but not so much for what succeeded (a particular liberal conception of rights) but for what was left behind (a structural approach to the problems of violent inequality and poverty). Central to this narrative is the story of the New International Economic Order and the once-transparent economic wrongs it sought to uncover and ameliorate. At one point, Dehm quotes the then-President of Algeria, Houari Boumédiène:

> In the eyes of the vast majority of humanity it is an (economic) order that is as unjust and as outdated as the colonial order to which it owes its origin and its substance. Inasmuch as it is maintained and consolidated and therefore thrives by virtue of a process which continuously impoverishes the poor and enriches the rich, this economic order constitutes the major obstacle standing in the way of any hope of development and progress for all the countries of the Third World.[4]

There is much to admire in Dehm's article but even this simple transcriptive gesture show us that what was once said, and said frequently, can be rendered unsaid and then unsayable.

How to say the unsayable, though? This is Jacob Zollman's question in his article on African international legal histories. In the genre of the international law of elsewhere (posing the obvious question about where we locate (London, The Hague, Washington) the international law of non-elsewhere or nowhere), Zollman asks how we might, or indeed whether we might, reclaim or reconstitute an African history of international law. This de-Hegelizing move is appealing but not so straightforward. There is the initial problem of getting people to care, or take seriously, this sort of agenda. The dangers of presentism, anachronism, and the demand of relevance and utility haunt this kind of work and Zollman is attuned to them. But even if there was to be a history of African international law, or an African history of African international law, where would we find the materials for such an exploration? Two vocabularies might be available. One would be an already-existing, or professionally recognizable language (so a process of translation might occur from African into a universal, or European language). The pitfalls here are too obvious to enumerate. The other possible language would be wholly new or wholly ancient. Here the problem of imperializing translation is displaced by the danger of illegibility and incomprehension. There is no easy answer but Zollman, at least, makes a plea to rethink the archive one might use in making African international law (a turn to archaeology or linguistics and away from, often absent, text and manuscript).

In the end, this symposium is itself a plea for a general rethinking. The authors and editors are to be congratulated. This is bold and interesting work in the endless task of pluralizing and de-pluralizing international legal method, provincializing European international law and de-provincializing extra-European global law.

[3] The work of Stephen Hopgood, Lynn Hunt, Sam Moyn, Joey Slaughter and more recently Margot Salomon comes to mind.

[4] Cited by Dehm from R. Meagher, *An International Redistribution of Wealth and Power: A Study of the Charter of Economic Rights and Duties of States* (1979), at 3.

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