

INTERNATIONAL LEGAL THEORY

Made in Empire: Finding the History of International Law in Imperial Locations

Introduction

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Abstract

A wave of interdisciplinary scholarship in the last two decades has managed to place empires at the center of the history of international law. This article surveys key insights resulting from this move and assesses remaining challenges. In explaining how the study of law in particular imperial locations can illuminate global legal transformations, the article identifies cross-cutting themes of articles in this special volume.

Keywords

empires; imperialism; jurisdiction; legal politics

Scholarship on empires and international law has undergone a sea change in recent years. The imperial turn in the history of international law has moved the field away from an exclusive focus on the writings of European jurists and toward the study of two other linked phenomena: the practice of law and politics in empires and the contributions to political thought of a broader range of historical actors in places across the globe. The articles in this symposium reflect these trends while contributing to new perspectives and signaling areas for further research.

Several recent strands in scholarship provide insights and inspiration. One effort has probed the links between imperial politics and legal thought in Europe. Historians of international law have highlighted European jurists' efforts to reconcile the idea of an interstate order of sovereign states with the reality of persistent empires and quasi-sovereignty within them.¹ Subsequent studies have taken this line of inquiry further and showed that quasi-sovereignty and its definition arose not just in Europe but also through jurisdictional conflicts in empire.² Scholars have also pushed further in investigating the influence of imperial conflicts on the legal thought of key figures in the history of international law, for example by examin-

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¹ See A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005); see also E. Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (2002).

² L. Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (2010), Ch. 5; K. Mantena, *Alibis of Empire: Henry Maine and the Origins of Indirect Rule* (2009).

ing how news of sea raiding reached Grotius or by investigating imperial agents' strategies as part of evolving doctrines of occupation and possession.³

A second, related effort in the literature on empire and international law has been to expand the scope of the history to include strategies and utterances of previously overlooked groups. Flexible arenas of social practice and legal thought labeled by one historian as 'jurispractice' comprised both legal strategies and vernacular political thought.⁴ Some historians have used this approach to analyze the engagement of non-elite actors in legal conflicts in empire, while others have examined the way colonial elites joined in debates about international law.⁵ Still others have proposed bureaucratic dispatches penned by middling officials as a formative genre of international law.⁶ Such efforts encompass research on periods and formations before the emergence of a field explicitly labeled as 'international law'. Earlier frameworks comprised regulatory routines structuring relations among political communities – a long phase of 'interpolity law'.⁷

A third, linked approach to the history of international law has reexamined the influence of ideas as they moved in unusual global circuits. Scholars have shown that European political thought sheltered deeply resilient ideas about sovereignty as divisible – a notion that infected revolutionary politics in the eighteenth-century Atlantic world and helped to merge imperial thinking with proto-internationalism in the nineteenth and twentieth centuries.⁸ Others have explored the way ideas and models for interpolity law traveled in patterns that cannot be described simply by tracing pathways from metropolitan centers to the periphery, or vice-versa. For example, the US Declaration of Independence influenced generations of anti-imperial fighters around the globe, and a similarly wide arc of influence followed the US Constitution as an export commodity.⁹ In the British Empire, mid-level officials moved in unplanned circuits and carried schemes for imperial law reform with them.¹⁰ More generally, we find a striking synchronicity in legal trends across very different regions: from reforms such as codification to global institutional formations such as prohibition regimes to waves of anti-imperial movements drawing on revolutionary

³ Examples are M. van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595-1615* (2006); L. Benton and B. Straumann, 'Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice', (2010) 28(1) *Law and History Review* 1; A. Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (2014).

⁴ Katherine Hermes coined the term 'jurispractice' in "'Justice Will Be Done Us": Algonquian Demands for Reciprocity in the Courts of European Settlers', in C.L. Tomlins and B.H. Mann (eds.), *The Many Legalities of Early America* (2001), 123.

⁵ For example, L. Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (2009); A. Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (2015).

⁶ L. Benton and L. Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (2016).

⁷ L. Benton and A. Clulow, 'Legal Encounters and the Origins of Global Law', in J.H. Bentley, S. Subrahmanyam and M.E. Wiesner-Hanks (eds.), *Cambridge History of the World* (2015), Vol. 6(II), 80.

⁸ A.L. LaCroix, *The Ideological Origins of American Federalism* (2010); D.C. Hendrickson, *Peace Pact: The Lost World of the American Founding* (2006).

⁹ D. Armitage, *The Declaration of Independence: A Global History* (2007); D. Hulsebosch and D. Golove, 'A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition', (2010) 85(4) *New York University Law Review* 932.

¹⁰ Benton and Ford, *supra* note 6.

ideologies.¹¹ In colonial history, scholars have explored the influence on legal politics of ideas transmitted across vast distances by vulnerable groups such as sailors, convicts, and slaves, and they have probed the effects of legal practices carried by sojourning elites across regions.¹²

These and other new findings suggest the power of studying jurisdictional tensions, struggles over the meaning of subjecthood and citizenship, the relation between metropolitan and colonial law, contests over definitions of territory and borders, and a range of other phenomena once considered marginal to the history of international law. Such patterns in imperial law have clearly influenced institutional shifts in world history while also shaping emerging understandings of international law. Similarly, concepts that an earlier generation might have regarded as settled elements of international law – sovereignty is a prime example – emerge as historically contingent constructs rather than fixed categories. European and American contributions to international law figure as part of a larger, truly global struggle over legal order. Its contours included open-ended understandings of sovereignty, repeating routines for marking territoriality and asserting rights of extra-territoriality, and frameworks for managing international conflicts.¹³

The effects of new research have not been limited to shifting perspectives on international law. A focus on law has also had a profound impact on the historiography of empires. In an older narrative, empires figured mainly as large states, examined for their participation in international pacts but not as generative sites for interpolity law. Historians have radically revised this understanding by studying empires as composite polities, that is, as systems of states that necessarily devised ways of managing legal complexity and ordering cross-polity interactions.¹⁴ In some times and places, imperial law appeared to offer an answer to the problem of global ordering. Certainly, in diverse regional contexts, imperial law acted as a force for regional integration and interpolity regulation, and these effects occurred well before the widespread recognition of international law as a professional field.

Of course, we should not overstate the globally integrative functions of imperial law. For a long phase of global history extending from 1400 to 1900, imperial spheres of influence were interpenetrating in vast regions that historians have labeled as ‘borderlands’. The history of interpolity relations in such zones, as well as in areas once classified as belonging to ‘informal empire’, draws our attention to the important role of alliances and treaties in structuring the relation of European and indigenous law.¹⁵ Recent research highlights the importance of protection as a framework for

¹¹ For example, M. Mirow, ‘The Power of Codification in Latin America: Simón Bolívar and the Code Napoléon’, (2000) 8 *Tulane Journal of International and Comparative Law* 83; E.A. Nadelmann, ‘Global Prohibition Regimes: The Evolution of Norms in International Society’, (1990) 44(4) *International Organization* 479.

¹² For just one example among many see I. Hussain, ‘Circulations of Law: Cosmopolitan Elites, Global Reperitoires, Local Vernaculars’, in I. Hussain and R. Mawani (eds.), ‘Forum: Indian Ocean Circuits of Law’, special issue, (2014) 32(4) *Law and History Review* 773.

¹³ T. Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (2014); L. Chen, *Chinese Law in Imperial Eyes: Sovereignty, Justice, and Transcultural Politics* (2015).

¹⁴ J. Burbank and F. Cooper, *Empires in World History: Power and the Politics of Difference* (2011); L. Benton and R.J. Ross (eds.), *Legal Pluralism and Empires, 1500-1850* (2013); Benton and Ford, *supra* note 6, Chapter 6.

¹⁵ S. Belmessous, *Empire by Treaty: Negotiating European Expansion, 1600-1900* (2015); Chen, *supra* note 13.

interpolity relations in the early modern world and reveals the stability of fluid webs of alliances over vast territories and long phases of world history.¹⁶

Other novel insights emerge from the blending of imperial history and the history of international law. The usual narratives about the phases of global law have begun to fray, for example. The broad periods outlined by Grewe for the history of international law now appear much less neat.¹⁷ Grewe's periodization suffered from assumptions that powerful European empires dominated particular periods when they effectively eclipsed the influence of non-European empires. Findings showing that global law emerged in a decentered way beyond Europe, meanwhile, have raised questions about whether European claims to influence matched reality. More generally, the problem of defining the international community rehearsed complex debates about the relation between law 'inside' and 'outside' imagined boundaries.¹⁸ Here the dual character of empires as composite polities and systems of states organized under a suzerain power took on special significance. Empires by their very existence blurred the boundaries between domestic and interpolity law; the same qualities offered up imperial spheres as awkward but useful analogies for international order.¹⁹

The history of rights has taken on different colours, too, when viewed through the prism of imperial legal history. A generation ago, it seemed easy enough to tell and retell a story about how the Enlightenment redefined good governance as involving a pledge to protect universally defined rights. That historical narrative has been profoundly unsettled, in large part (though not exclusively) by imperial histories. We now have vivid examples of the way definitions of rights related to the assignment of status positions within empires rather than residing in a settled universalism.²⁰ Even explicit references to natural rights in imperial contexts – including in the American and Haitian Revolutions – paralleled louder and more insistent claims in favour of the positive right of political communities to break from empires and establish themselves as autonomous entities.²¹ This retelling of rights history has profound implications for understanding how rights function up to the present; the Responsibility to Protect doctrine, for example, begins to take on the shading of an imperial doctrine coloured by hegemonic structures still embedded in the global order.²²

These and other results establish the value of bringing the study of empires and the history of international law together. The articles in this symposium place the

¹⁶ L. Benton and A. Clulow, 'Empires and Protection: Making Interpolity Law in the Early Modern World', (2017) 12(1) *Journal of Global History* 74.

¹⁷ W.G. Grewe, *The Epochs of International Law*, (translated by M. Byers) (2000); see the critique of Grewe in Benton and Ford, *supra* note 6, at 19–20.

¹⁸ R.B.J. Walker, *Inside/Outside: International Relations as Political Theory* (1993); A.S. Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (2011).

¹⁹ Benton and Ford, *supra* note 6, Ch. 7.

²⁰ See especially J. Burbank, 'An Imperial Rights Regime: Law and Citizenship in the Russian Empire' (2006) 7(3) *Kritika: Explorations in Russian and Eurasian History* 397; J. Pitts, *Boundaries of the International: Law and Empire* (2018).

²¹ Armitage, *supra* note 9; M. Ghachem, *The Old Regime and the Haitian Revolution* (2012).

²² A. Orford, *International Authority and the Responsibility to Protect* (2011); Benton and Ford, *supra* note 6, Ch. 7; L. Benton, A. Clulow and B. Attwood (eds.), *Protection and Empire: A Global History* (2017).

rewards on bright display. Each analyzes a particular ‘imperial location’ in depth, highlighting extensive and intensive links between local imperial conflicts and broader international legal trends. In the process, several powerful, crosscutting themes emerge.

Several articles locate the origins of key elements of international law squarely in the politics of empire. For example, Obregón traces Haiti’s quest for recognition after the Haitian Revolution and shows that in a series of negotiations between Haiti and France, fluid ideas about the recognition of states converged on the notion of payment of an indemnity to France in exchange for accepting Haiti’s independence. Further, Obregón shows the persistence of imperial forms in negotiations about the possibility of recognizing Haiti as a polity under the protection of France. In examining the continuities between Haiti’s struggle to avoid and then meet indemnity obligations, Obregón notes that ‘the Haitian population has never experienced itself as completely free of empire’.

Other studies highlight the theme of continuities of imperial and international law. Rose Parfitt suggests a radical reassessment of the notion that ‘fascist legality’ and ‘international legality’ are contrasting in their effects. Rather than merely describing similar tendencies to legitimize violence, Parfitt draws attention to the deep affinity for the ideas of sovereignty and self-determination as solutions to problems of international ordering – when such ideas in fact carried ideological weight in favour of expansion and economic domination.

Several authors grapple with the question of how imperial legalities underlay naturalized economic assumptions inscribed in later international law. The point comes across most clearly in Kerry Rittich’s fascinating profile of the US occupation of Iraq as an imperial and international legal event. Rittich notes the occupation’s ‘marked continuities with earlier European interventions in the periphery’. But her deeper point is that the ‘imperial’ can no longer be associated with the dominance of an individual power. Instead, the Iraq occupation must be understood in the context of the diffused and naturalized power of ‘economic surveillance by the IFIs [international financial institutions], for reasons of debt relief, financial stabilization, and/or development assistance’. This naturalized economic dominance not only disguises latent imperial power relations. It also distributes imperial power ‘across multiple sites and [mobilizes it] through the actions of diverse institutions’.

This perspective draws analysis both outward and inward. Nuzzo provides a rich illustration of this approach in his detailed study of the legal framework and practices of the foreign concession in the city of Tianjin. On one level, the specificities of the location are shown as driving Western strategies of expropriation and Chinese accommodations. On another level, we glimpse the resulting whole as more than the sum of its parts; even if unco-ordinated, the presence of multiple powers and their agents gave form to an enclave ‘placed under different foreign powers’ but simultaneously structuring ‘competition and cooperation between them’. As Nuzzo argues, the effect was not only to mark Chinese and Westerners as different on the basis of cultural historical diversity but also to generate a new, unnamed international formation in which the drive toward ‘juridical homogenization’ worked to perpetuate juridical complexity.

This is not your grandfather's imperialism, it would seem. Colonies were guided and even run by international consortia, and imperial power was distributed across an array of institutions and economic conventions. A reasonable inference is that we cannot understand the legalities of late capitalism and modern global ordering without grasping these complex imperial and interpolitical formations. And yet, in part, the articles here also suggest that the attention to complexity and variety of imperial forms should not be limited to nineteenth or twentieth century phenomena. The approach should be pushed both backward to analysis of imperial law in seemingly simpler arrangements of power and forward, to the present, in seeking ways to describe complex regional and global regulatory orders hiding in plain sight. More broadly still, we can derive from specific historical studies generalizable analytical approaches with applications across time and place.

As a methodological recommendation, this suggestion takes specific form in Luis Eslava's article on the Bantu Education Kinematic Experiment, a project to produce films in the 1930s in Tanganyika, Kenya, Uganda, Northern Rhodesia and Nyasaland. While the project promoted a vision of a new international order constructed on the basis of economic participation and self-rule, we are told that its effect was to reinterpret indirect rule. By aiming to shape the subjectivities of colonial actors, the project exposed the ways in which indirect rule and its idea of colonial agency 'widened rather than narrowed, somewhat counter-intuitively, the scope and the degree of colonial intervention'. For Eslava, the subjects themselves serve as moving 'imperial locations' and as objects and carriers of 'asymmetries of power'. Such a perspective carries both backwards and forward in time, inherently linking imperial and international legalities through representations of personhood.

The contributions in this symposium illustrate some and introduce other new approaches to the history of international law. Building on insights from the imperial turn in the history of international law, they assert the importance of imperial and post-imperial phenomena – including jurisdictional conflicts, imperial legal administration, the political economy of unequal power, and colonial subjectivities – in shaping the trajectory of global ordering. They join other works in revising the history of international law by emphasizing themes other than genealogies of juridical concepts. They include but also move beyond histories of praxis by taking account of diffuse and uneven processes in which new political and legal thought was emerging. We need not worry that the proliferation of case studies of imperial locations will result in a cacophony of findings. Individual cases can illuminate broader patterns and expose analytical angles bearing on the broadest questions of the history of global and international law.