Overcoming Eurocentrism? Global History and the Oxford Handbook of the History of International Law

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European thought is at once both indispensable and inadequate in helping us to think through the experiences of political modernity in non-Western nations, and provincializing Europe becomes the task of exploring how this thought – which is now everybody's heritage and which affect us all – may be renewed from and for the margins.[1]

Last Spring, the *Rechtskulturen* programme, an initiative of the Wissenschaftskolleg zu Berlin at the *Transregionale Studien* Forum, invited me to participate in a symposium on the *Oxford Handbook of the History of International Law*[2] – a robust book of 1250 pages. I was asked to 'critically assess' the *Handbook*'s 'global history' approach, that is, to assess whether it was a successful step in 'overcoming Eurocentrism' in the history of international law. The symposium turned out to be a wonderful event, a gathering of historians, anthropologists, political scientists, and lawyers, where I became very conscious of my own professional language but where I also experienced a willingness to transcend disciplinary boundaries and biases. The following remarks should be interpreted as a continuation of that discussion. Before looking at some of the contributions in the *Handbook* that did depart from 'well-worn paths' (to use the editors' expression) (3), I would like to say few words about the 'global history' approach (1) and the unfortunate resilience of Eurocentric voices in the *Handbook* (2).

1 Problems with the 'Global History' Approach

The 'global history' approach that inspired the *Handbook* emerged in the early 1990s, mostly in the Anglo-Saxon academic world, as 'the answer of (Western) historians to globalization' (at 8). Accordingly, it focuses on 'transfers, networks, connections, and cooperation between different actors and regions, while trying to avoid the

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1 D. Chakrabarty, *Provincializing Europe. Postcolonial Thought and Historical Difference* (2000), at 16.
2 B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (2012).

temptation to draw straight lines from one time and place to another' (at 9). What was particularly important for the editors of the *Handbook* is the attention given by global historians to non-European societies and regions. Their history is understood as an autonomous development, and not as a mere reaction to European conquest. Similarly, the editors wanted to dislodge the sanctity of Western stories and to shift perspectives on the history of international law. Inspired by the inclusiveness of the 'global history' approach, the editors included histories written both from the centre and the peripheries, in order to fight the sense that there would be one and only one history of international law, which would be both linear and European. This can only be applauded.

However, I become worried when I read that the editors' overall ambition was to allow for 'a multipolar perspective' (at 10). This suggests that the conflicting histories of international law could be presented side by side, on equal grounds. The *Handbook* would be a fashion-like magazine, displaying the various perspectives so as to allow the reader/consumer to pick the most attractive one.[3] The problem with such a liberal-pluralist approach is not only that it flattens differences and reduces political projects to commodities, but also that it makes its own politics invisible. No attention is given to the historical prevalence of Western narratives or to issues regarding the production of knowledge. Given the *Handbook*'s strong liberal assumptions, it is not surprising that its structure remains distinctively Eurocentric: most themes and actors belong to the understanding of international law as a modernizing project with no geographical bias and no implication in commercial exploitation ('capitalism' does not even appear in the index); the encounters between continents all involve Europe (why is there no section on the encounter between China and Japan, for instance?); and finally, out of the 21 individuals presented in portrait, 19 are white European men.[4]

My point is not that the editors failed to deliver a 'global history' in which everything would have been visible, for that is an impossible undertaking. Choices are needed. Rather, my point is that if the editors seriously aim at 'overcoming Eurocentrism' in the history of international law, then a radical shift of vocabulary – and not the search for a middle ground – is necessary to enable us to see things that were previously hidden. When the editors acknowledge that they did not succeed 'in completely avoiding a Eurocentric perspective' (at 2), it looks more like an incidental hiccup than an expressed recognition of their (mild centre-left) politics.[5]

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[3] This critique of liberalism is similar to that of Koskenniemi, 'Letter to the Editor of the Symposium', 93 *AJIL* (1999) 351, at 352.

[4] The other two are Muhammad al-Shaybani (an Islamic law jurist) and Bertha von Suttner (an Austrian female activist).

[5] The editors claim that their decision to ask authors to end their account in 1945 is 'less Eurocentric' because 1945 marked a 'caesura' in world history and opened the 'era of the United Nations', *supra* note 2, at 3. My sense is that this claim is deeply ingrained in European thought and that it obscures international law's involvement in the more recent history of decolonization and globalization of international law. See Chimni, 'The Past, Present and Future International Law: A Critical Third World Approach', 8 *Melbourne J Int'l L* (2007) 499, at 512–513. See also his contribution to the *Handbook*, 'Identifying Regions in the History of International Law', at 1069.

2 Resilience of Eurocentric Voices in the *Handbook*

One consequence of the *Handbook*'s liberal-pluralist approach is the resilience of Eurocentric voices. The most blatant example is found in the chapter on 'The Protection of the Individual in Times of War and Peace' by Robert Kolb. All rules that have, throughout history, governed the conduct of warfare outside Europe are swept away in one paragraph. Why? The problem with those rules, according to the author, is that they do 'not truly aim at the protection of 'individuals' in the modern sense of the word' (at 322). Such protection was only achieved in (Christian) Europe, through a process of codification and institutionalization that started in the 19th century and culminated with the adoption of the Geneva Conventions in 1949. In this self-glorifying account, there is no mention of the way in which the laws of war always allowed brutal forms of colonial warfare that would have been prohibited in European wars.[6] There is no criticism whatsoever of the standard of civilization. On the contrary, 'the idea of civilization [has] given rise to the fight against slavery and diseases, to the effort to protect the wounded and sick in war' (at 331). It is also thanks to 'a minimum standard of civilization' (at 333) that the *Institut de droit international* adopted in 1929 a Bill of Rights, which, to the author's regret, had no legally binding force. This is the epitome – or the caricature – of the Eurocentric voice that still thinks of itself as the true, universal one.

The Eurocentric tone is not always that explicit in the *Handbook*. The chapter on 'States: Rise and Decline of the Primary Subjects of the International Community' is a subtle, yet remarkable, illustration of the Eurocentric narrative that turns away from states to universal institutions and technical professionalism.[7] Having shown that sovereignty has always been the major stumbling block to any real progress towards an international community, Antonio Cassese ends his chapter with the following question: 'when [will] the individual State's authority … be replaced by the power of the community?' (at 69). This narrative does not 'overcome Eurocentrism' *because it speaks a thoroughly Eurocentric language*. Indeed, there is not much difference between this teleological account and the international law that originated in late 19th century Europe as an anti-sovereignty project – that is, one that supported abstract cosmopolitan ideas, legal rules, and international institutions against the Realpolitik of statehood.[8]

The chapter on 'Minorities and Majorities' is also a missed opportunity. The story being told is one of a long struggle against statehood. Even though the author does mention that minority protection bears the mark of the civilizing mission of international law, the thrust of her chapter is devoted to showing that minorities have gradually been 'included by the discourse as a possible new, emerging, international legal

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6   Mégret, 'From "Savages" to "Unlawful Combatants": a Postcolonial Look at International Law's "Other"', in A. Orford, *International Law and Its Others* (2008), at 293.

7   The same could be said about the chapter on International Organizations (entitled 'Between Technocracy and Democracy').

8   This is well explained by Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism', 19 *Rechtsgeschichte* (2011) 152.

person' (at 118). Nothing is said about what is *done* by the discourse. Nothing is said about the ways in which the changing interpretation of rules affected the identities and participation of traditionally marginalized groups such as colonial and nomadic peoples, ethno-cultural minorities, indigenous peoples, and women.[9]

It is a pity that so many Eurocentric accounts of the history of international law found a place in the *Handbook*, given that the editors genuinely tried to open up. The resilience of such accounts shows that, even if post-colonialism has become 'international law's official ethos',[10] it is still the case that 'Europe rules as the silent referent of historical knowledge'.[11]

3 Samples of Postcolonial Histories of International Law

Once we acknowledge that too many histories of international law are still Eurocentric, what should we do? The editors' response is clear: we have to 'overcome' that problem. Leaving aside the problem of how to proceed (I will come back to this), let me say a few words about the idea of 'overcoming Eurocentrism'. This idea presupposes that it would be possible to get rid of Eurocentrism or to vanquish it once and for all, as if it were a tumour. Accordingly, once Eurocentrism had been overcome, we would be free to ask how the (now) truly universal international law can best end human suffering, while not falling prey to abuse by powerful states. I find this way of thinking to be part of the problem. As Anne Orford has pointed out, this way of thinking is 'part of a tradition that is deeply ingrained in Western thought, imagin[ing] that "we who are presently alive are not compelled to repeat the past"'.[12] By arguing that legal concepts move across time and even space, she argues – together with Antony Anghie – against 'the willed forgetting of international law's imperial past'.[13]

This drawback suggests that the first way to deal with Eurocentrism is by continuing with the post-colonial critique. This consists of 'the careful demonstration of the colonial origins of an international legal rule or institution'.[14] One attempt is found in the chapter on 'Slavery', in which Seymour Drescher and Paul Finkelman describe slavery 'as a legal and economic system' (at 892). The post-colonial critique can also be found in the chapter on 'Colonialism and Domination'. How exactly, asks Matthew Craven, is the emergence of the European states system connected to the expansion of mercantile empires and the taking of colonial possessions? His argument is that the dynamics of the colonization process were shaped by, and shaped in turn, changing

[9]   This has been done, notably, by K. Knop, *Diversity and Self-Determination in International Law* (2002).

[10]   Koskenniemi, *supra* note 8, at 155.

[11]   Chakrabarty, *supra* note 1, at 28.

[12]   Orford, 'The Past as Law or History? The Relevance of Imperialism For Modern International Law', 2 *Int'l LJ Working Paper* (2012) 1, at 5. She quotes Constantin Fasolt in *The Limits of History* (2004), at 7.

[13]   She argues against contextualist historians that have attacked Anghie and other postcolonial critics for making 'anachronistic' judgments about individuals such as Vitoria. She supports Anghie's claim that 'imperialism is a constant': A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2007), at 315.

[14]   Koskenniemi, *supra* note 8, at 171.

conceptions as to the nature and character of governmental authority (at 864). A detailed analysis reveals a shift in the conceptualization of the colonial rule framed in terms of *dominium*, to one structured around the idea of *imperium*. This is visible in the ways in which the technologies of expansion were first articulated in terms of the straightforward acquisition of property (whether original or derivative), before the relations of property became the active object of colonial rule rather than its precondition. 'Colonialism was not just about acquiring things as property, but about turning things into property' (at 888). Thus, for Craven, colonialism, imperialism, and capitalism go hand in hand: in the colonies, the rationality of *imperium* was increasingly organized around the idea of establishing the conditions for the enjoyment of private property and exchange.

Such Marxist-inspired argument does not go uncriticized in the *Handbook*. In his chapter on 'Eurocentrism in the History of International Law', Arnulf Becker Lorca regrets that post-colonial historians present international law as a superstructure determined by power. The problem is that they create a 'blind spot regarding counter-hegemonic uses of international law by non-Western actors' (at 1054). To remedy that bias, attention should therefore be directed to the 'hybridization of the legal concepts as they travel from the colonial metropolis and their changing uses in the hands of the colonized'.[15] Liliana Obregón goes into that direction in her chapter 'The Civilized and the Uncivilized', by showing how international law was appropriated by Latin American Creole elites in the 19th century and used as a force for liberation. In Haiti, the standard of civilization became internalized by former slaves, and then turned upside down to support their anti-colonial project. The 1804 Haitian declaration of independence and the 1805 first constitution thus inverted the civilized/barbarian labelling: 'the French were described as the "barbarians who have bloodied our land for two centuries" while the Haitians were "a people, free, civilized and independent"' (at 923). This contrasted with paths taken by other Latin American elites, who were eager to show that they had attained the degree of civilization necessary to enter the 'community of civilized nations'.[16]

In the same vein, Jorge Esquirol shows in his chapter on 'Latin America' that from the turn of the 20th century and onwards, Latin American scholars – the most vocal one being Alejandro Alvarez – defended the existence of an American international law that was 'as equally international law as the dominant European version' (at 563). To be sure, there were disagreements among those scholars: for instance, should the US belong to the group? Is there really a separate American international law or are there simply principles originating in Latin America? Nonetheless, all of them defended a project having in mind the precarious times for Latin America – i.e., the transition

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[15]   *Ibid.*, at 173.

[16]   This path was fragile because 'if there was no external standard for civilization then everything depended on the degree to which aspirant communities were ready to play by European rules. But the more eagerly non-Europeans wished to prove that they played by European rules, the more suspect they became': M. Koskenniemi, *The Gentle Civilizer of Nations: the Rise and Fall of International Law, 1870–1960* (2002), at 134–135.

from European to US imperialism. 'Thus', concludes Esquirol, 'irrespective of the conceptual difficulties surrounding a particularistic international law, this project reveals a geo-politically meaningful development of legality. It offered a means for addressing both US and European imperialism. It also showcased Latin American statesmen and publicists as equal creators, and enforcers, of international law' (at 565).

This is not the same as examining autochthonous legal vocabularies and dispute-resolution mechanisms. In their contribution ('Africa North of the Sahara and Arab Countries'), Fatiha Sahli and Abdelmalek El Ouazzani explain in detail the Islamic rules governing war and peace. They analyse North Africa's relationships with other powers (mainly Christian) from the 16th century and onwards, the strategic character of those relationships, and the legal tools that were used to regulate them. They point to the 'contribution of Islam to international law', which is particularly important 'in the field of the protection of the laws of the religious minorities and the humane treatment of the war prisoners' (at 405). This kind of study is necessary not because it would show that Islamic countries are as sophisticated as European ones or that 'they, too, had international law'.[17] Instead, as Martti Koskenniemi has written, such studies are needed 'to illuminate the diversity of human experience and to create critical distance towards the intuitive naturalness of stories we have learned'.[18]

Such distance can also be created by focussing on the encounter between Europe and the New World 'as an important, even foundational moment to the discipline itself'.[19] Such study would not only show the ways in which Europeans came in contact with (and dominated) the 'Other', but would also demonstrate that the native communities were far from being passive or clueless. In his chapter on the 'Ottoman Empire', Umut Özsu explores the ambiguities surrounding the legal concept and practice of the 'capitulations'. It is true that by the late 19th century, capitulations had become tools of Western imperialism. However, these had been mechanisms of governance in the Ottoman Empire, i.e., 'mechanisms which may have been overlaid with imperial and theological sanctification but which aimed above all to bolster trade, cement alliances, and delimit jurisdictional boundaries in a complex environment' (at 446). Similarly, in the chapter entitled 'North American Indigenous Peoples' Encounters', Ken Coates highlights the diversity and 'complexity of the Indigenous-European counter' (at 789) as it involved indigenous concepts of law and land ownership, military and commercial alliances, as well as formal and informal treaties. We learn that, while the Spanish theologians were disagreeing with respect to the conquest and settlement on native soil, the European powers were concluding treaties with the First Nations – thus treating them as political authorities – while having no problem abrogating or simply ignoring those treaties when needed.

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[17] Doing so, they would fall into the trap of projecting European categories as universal: Koskenniemi, 'A History of International Law Histories', in Fassbender and Orford, *supra* note 2, at 963. See also Lorca, 'Eurocentrism in the History of International Law', *ibid.*, at 1038 and 1047.

[18] Koskenniemi, *supra* note 8, at 170.

[19] *Ibid.*, at 172.

This brings me to the quotation with which I started this review. In 2000, Dipesh Chakrabarty, a Bengali historian, published a book that made a central contribution to postcolonial studies, in which he wrote: 'European thought is at once both indispensable and inadequate in helping us to think through the experiences of political modernity in non-Western nations, and provincializing Europe becomes the task of exploring how this thought ... may be renewed from and for the margins'.[20] I understand this to mean that international law as a European universalizing project is our iron cage. It may not be possible to think outside it, but it is possible to 'provincialize' or to 'exoticise' Europe and European laws in order to renew it from and for the margins. Provincializing Europe is something well done in the chapter on 'Japan'. There, Masaharu Yanagohara gives us the sense that Europe, too, is just a continent with its particular 'interests and neuroses, wisdom and stupidity'.[21] Before its so-called 'opening' to the world, Japan was much more concerned with China's imperial ambition, and Europe appeared only now and then, under the guise of (Dutch) trading partners. From the mid-19th century, Japan started to use the newly encountered international law to further its own domestic agenda, such as to assert its sovereignty over the Ryukyu Islands (against China's traditional rules). Japan also used international law to conclude 'unequal treaties' (at 496) with Asian countries in order to obtain a predominant status in the region.

Last but not least, James Thuo Gathii's chapter on 'Africa' can be seen as an empowering act. He depicts Africa's contribution to the history of international law through a genealogy of African TWAIL scholars, explaining the ups and downs of their critiques.[22] This is a subtle and yet powerful rejection of Europe's projection of Africa as the poor, backward continent. Gathii also underlines that many international lawyers in Africa today share a dual sensibility: 'a sense that Africa and the Third World are treated differently in the international order, but at the same time a sense of hope that international law can lead to an alternative future' (at 426). This ambivalence attacks the myth that there would be a return possible to some pre-colonial authenticity. It also forces us to think 'beyond Eurocentrism'.

What do I mean by that? The *Oxford Handbook of the History of International Law* is part of the emerging postcolonial consciousness in the field of international law today. It accepts that international law is a European vocabulary and that it has been used as an instrument of colonial expansion and exploitation. This fact cannot be forgotten, surpassed, or denied. But, as several contributions to the *Handbook* indicate, international law (even as a European vocabulary) is indeterminate, contradictory, and amenable to different uses. Put differently, postcolonial histories have chosen European colonialism as 'the context'[23] in order to show international law's implication in the

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[20] Chakrabarty, *supra* note 1.

[21] Koskenniemi, *supra* note 8, at 175.

[22] He analyses in details the work of Taslim Elia Olawale, and then of international legal critical theorists such as Makau Wa Mutua, Siba Grovogui, Kamari Clark, Ibironke Odumosu, and Obiora Okafor.

[23] On the importance and limits of contextualism see Koskenniemi, 'Vitoria and Us. Thoughts on Critical Histories of International law' (on file with the author).

enormously unequal distribution of global wealth. Yet this is not the only possible 'context'. For those who want to show how international law is complicit in today's injustices but also how it can contribute to emancipation, attention should be directed towards other forms of oppression involving class, gender, religion, and violence.