The European Journal of International Law Vol. 32 no. 3
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Editorial

Editorial: Brexit, the Irish Protocol and the 'Versailles Effect'; In This Issue; In This Issue – Reviews

Brexit, the Irish Protocol and the 'Versailles Effect'

What does the Treaty of Versailles have to do with Brexit, you may be asking yourself? Quite a lot, I would like to suggest.

But a preliminary comment is necessary. In the current state of polarized societies and, increasingly, a polarized academy, an old-style 'Voltairian liberal' like myself (of the 'I disapprove of what you say, but I will defend to the death your right to say it' ilk), who is, too, an accommodationist by disposition and praxis (of the 'let's look for a solution that can accommodate as much as possible the conflicting positions' ilk), regularly manages to alienate both poles. Say one good word on the redistributive policies of the current Polish government and the response will be brimstone and fire from one pole. (Excuse the pun.) Say one (or more) bad word on their rule of law policies, and dust and ashes will rain down from the other pole. You end up being the 'enemy' of both. Polarization. This is not a personal, 'poor me' complaint. From the privileged position of a tenured law professor in an elite American law school as well as with the privilege and mellowness that aging brings about (an old, old liberal), I live with such comfortably. But it is, one should admit, inimical to deliberative discourse, let alone civility. The position you do not like is not perceived as an invitation to self-reflection and, *mirabile dictu*, even a change of opinion, but just as an invitation to conjure up every possible objection in defence of a pre-formed position. When is the last time you heard in such debates the endangered-species words – 'Yes, you are right. You have convinced me'?

In an era in which Euroscepticism has moved from the margins of the lunatic fringes into mainstream politics, the same has become true when writing about our (speaking as a European citizen) Union. Making a serious critique of the European Union and its Court (take a look at the recent *Wabe* decision – 'pandering to prejudice for profit' in the words of one Oxford scholar) makes you, *ipso facto*, a Eurosceptic and 'one of them'. Defend the bedrock civility and spiritual significance of the European Construct as envisaged by its Founding Fathers (drawing on their deep Catholic commitment) and, hey presto, you are one of the other 'them'.

I am a card-carrying member of the 'other them'. I lament deeply Brexit and have run out of words to describe the ineptness of successive British governments, from the Chutzpah of David Cameron (https://doi.org/10.1093/ejil/chw047), the ineptness

of Theresa May (https://doi.org/10.1093/ejil/chaa011) and the – pick your own word – of Boris.

But in handling Brexit generally, and the current crisis over the Northern Ireland Protocol more specifically, it is the Union that has been committing and is continuing to commit a blunder of strategic and historic proportions – which brings me to Versailles. Save your breath: Brexit is not even remotely in the same league as the catastrophe of World War II. But there are structural lessons from Versailles which are directly applicable to any long-term relational treaty and should have had direct effect in this case too.

In negotiating a contract for the sale of a used car in a private transaction, the seller will try to extract the highest price, the buyer the lowest price. Once agreement is reached, the contract is signed, and almost immediately executed: the seller gets the money, the buyer the car, and they may never see each other again. The buyer's remorse is of no avail. It is the nature of an executionary contract.

In negotiating the sale of a car by a dealership, the wise dealer will treat (or pretend to treat) the buyer with utmost respect. Critically, the (wise) dealership may not try to extract the highest price. They are establishing a relationship, hoping the buyer will return for his or her second and third car.

Even more so, when negotiating a long-term contract for services – say a laundry service for a hotel – each party is somewhat dependent on good relations, good future services and the like. Even if it happens to be a 'buyers' market' (giving more negotiating leverage to the hotel), the wise 'buyer' may not press his or her advantage to the full – they will want the laundry service to feel they got a good deal and they certainly won't want to create an incentive for the company to squeeze the quality of their service in order to compensate for a cut-throat deal and seek every opportunity to weasel out of the contract, even by breach, at the first opportunity.

In a negotiation class, the above truisms will be dressed up with fancy words, but oftentimes simple commonsense makes commonsense.

The same is true with long-term peace treaties. Both parties have to walk out of the negotiations with long-term incentives to make the agreement endure if it is to endure. Which brings us to Versailles.

There is virtual unanimity among historians that the Treaty of Versailles was a cause and/or facilitator in bringing about World War II. (Naturally, they war ferociously as to the specific weight to be given to this factor.) Be that as it may, there are more 'modest' lessons to be learnt from that experience, even outside the context of war and a peace treaty.

Versailles was a treaty that contained its very own 'poison pills' – doomed to self-destruction (and would be so even if it had not resulted in WWII). And why so?

- It was, by the nature of things, a 'negotiation' where there was no equality of arms. It could not have been otherwise. Even after one week in a negotiation class you will know how delicate such structural inequality is for the long-term viability of a long-term relational treaty (as distinct from an executionary treaty). It requires incredible maturity and sophisticated diplomacy by the powerful side to reduce the inherent risks of this structural inequality.

- If you follow the process of the 1919 Paris Peace Conference you cannot but come away with the conclusion that not only was there the inevitable inequality of arms but the Victors used every trick in the bag to drive that point home, adding unnecessary fuel to the already extant structural fire. And more: although it was called a Peace Conference, when you read through the statements made during the Conference you could call it equally the Punish Conference or the Revenge Conference. President Woodrow Wilson valiantly warned against such. This is not an argument for moral equivalence, but a much simpler proposition that if you are in the peace-making business such feelings, statements and policies might be inimical to the principal purpose: a durable peace. If anyone needs reminding, against this background, the genius and political and, yes, spiritual maturity of Monnet et al. shines through with particular brilliance. They had clearly learnt and internalized the lessons of Versailles. (There is a plethora of excellent academic writing on the 1919 Paris Conference – Arno Meyer's 1967 classic is just one of many – but the best readings are the first-hand diaries or memoirs. If you do not want to spend your precious Sabbath reading time plowing through the likes of David Hunter Miller or Harold Nicholson or John Maynard Keynes (all three riveting), I can recommend one documentary and one wonderful docudrama available freely on Youtube: The Treaty of Versailles (an interesting iconoclastic view) (https://www.youtube.com/watch?v=T7iXNZJsa6s) and Paris 1919 (https://www.youtube.com/watch?v=BjmpMY22lqg) respectively.)
- In addition to the structural inequality of arms (Germany had practically no negotiating chips – other than a no-deal exit), the internal divisions and instability within Germany and German politics weakened further its hand. Make no mistake: it is not as if there were no internal divisions among the principal Victors (famously, or infamously, the American Congress, that Cemetery of Treaties, ended up repudiating Wilson's major (only?) achievement, the League of Nations) and it is not as if there was a common front among them (Italy, to give but one example, walked out). But the weakened German position was no match for the forcefulness of the likes of Georges Clemenceau (a major winner in the short term, loser in the long term), David Lloyd George and Wilson himself.
- And last, but certainly not least, the terms themselves. Set aside any moral judgment and consider just so (mis)called Realpolitik considerations. A regime of reparations measured in tens of billions of dollars in gold to last into the 1990s? Could anyone in 1919 seriously have considered this a viable term? Could anyone not see the practical and symbolic toxic nature of such in the context of an attempt to ensure long-term peaceful relations? And the same can be said about the permanent disarmament conditions, the territorial concessions without regard to demographics – it is a well-known story that obviates repetition.

The autodestruct nature of process and the resulting terms were written in bold letters on the wall. Ramming the Treaty down the throat of Germany was the mother of all Pyrrhic victories.

The parallels to the Brexit negotiations and the Backstop (remember that word?), which morphed into the Northern Ireland Protocol, are, to me, undeniable. Yes, you can distinguish the two cases in every which way. But the basic underlying parallels cannot be wished away.

Before I get to that, let us give credit where it is due. In the negotiations leading up to the Referendum, the EU generally, and the Commission specifically, showed admirable maturity and sophistication. Jean-Claude Juncker, in my view one of the ablest, if not the ablest, Presidents in the history of the Union, left no stone unturned in attempting to meet all of Cameron's 'conditions' – including provisions on migration which came perilously close to transgressing extant EU law. No one could blame the Commission and the Union for not doing everything on the specific Brexit agenda in their power to avoid a No vote. They could have played hardball. Instead, wisely, they played softball.

So now we can begin to examine the underlying structural parallels to Versailles, despite remarkable differences in context and specific circumstances.

- Since politics are made of and by men and women, and are thus susceptible to the foibles of the human condition, having bent over backwards to accommodate every British 'condition', the sense of disappointment, even shock, at the results of the referendum were mingled with a profound feeling of not only anger but also betrayal. You are naïve, in my view, if you do not believe that this injected a sentiment of punishment – 'let's show them' – into the ensuing Brexit negotiations on the part of the Union. And this might explain partially why the difference with the pre-Brexit negotiations. Explain it, not justify it: the role of statesmen and women is to dominate those foibles of the human condition in the interest of self-interest, let alone the collective good.

  The inequality of arms in the Brexit negotiations was structurally inevitable if you compare the size of the markets and the leverage and bargaining chips of each of the parties. And here, too, despite a much smoother diplomatic rhetoric compared to Paris 1919, the EU drove that point home relentlessly – on all the major issues its position was pretty much 'Take it or leave it or leave'. The 'nuclear' weapon, No-deal Brexit, was also asymmetric – damaging to both, but far more to the United Kingdom than the EU as the end game proved. (Poker, apparently, is not a popular game in the UK.)

  A good example of this occurred at the beginning of the negotiations. The Brits favoured parallel tracks: negotiating divorce conditions alongside future trade arrangements. The Union insisted on divorce first – we know who won that one, at huge cost to both parties because of a wasted one and a half years of negotiations, with the inevitable appalling time crunch in the last set of the match. I do not think anyone can come up with a rational explanation for that Union insistence, especially when weighed against the rushed and stressed trade and services negotiation when they began in earnest. I have wondered if this was impacted by the time-honoured (and usually effective) custom of intra-Union tough issue negotiations, where the worst is left to the last, pressurizing the bleary-eyed ministers to compromise? Except that in this case it backfired badly, as I shall argue below. Be that as it may, on all *major issues* the

inequality of arms led the Union to similar take it or leave it positions, which the British simply had to swallow.

Part of the EU iron fist–velvet glove strategy (not merely having a huge negotiating advantage, but playing hardball with it) was not just motivated by that pique, disappointment and betrayal sentiment described above. There was an openly, if never officially admitted, strategy of Scaring the Others. If we make life too easy for the Brits and give them too sweet a deal, maybe other Member States will be tempted. The tougher we are, the tougher the deal, the less likely such copycat conduct by other Member States.

It is worth digressing a bit from the main subject (Brexit) to explain why I believe that in historical terms this might have been the biggest long-term strategic miscalculation. That fear of Member State departure is a pathological fetish. The future of our Union depends on Member States that do not feel coerced to remain in the marriage and do not at every crisis make the utilitarian calculus of 'What's in it for me'. The long-term future of the Union depends on European societies thinking of Europe as their Community of Fate (à la Herder). This is who we are, this is what we have – let's try and make the best of it, as one does mostly in national contexts. (One of the most disastrous consequences of polarization at national level is the upending of this very sentiment.)

Would the Union not have been better off negotiating (offering in effect) a dignified status to an ex-member (Associate Member?) with the best possible trade terms), without of course a vote in the Union and without the myriad non-market benefits of membership – COVID recovery fund anyone? And if others were tempted to move to that status, would not they and the Union be better off, rather than having a bunch of Trojan horses in the city?

- No less than Germany in Versailles 1919, Britain in 2019, too, was hampered by a society fractured around the very issue of Brexit, reflected in a fractured Parliament and, even more remarkable, deep fractures within the two main political parties as well as in the civil service itself. (The story of the UK civil service in the Brexit debacle is yet to be told.) Thus, augmenting the inequality of power at the negotiation table was the fragility the British ministers experienced in terms of backing from the home front and the legitimacy that any solution would enjoy or suffer in domestic politics and general public opinion. The Remainers favoured as tight a nexus as possible to the Union, including a Customs Union (not, I suspect, fully understanding the implications of such) whilst the Brexiteers, notably within the Tory party itself, were pushing in exactly the opposite direction. The situation was not helped by the cluelessness of senior British politicians on some of the most basic concepts involved. (That Theresa May needed, *post facto*, an Opinion of the Attorney General of the UK to clarify a point that would be obvious to a second-year law student, namely that the Backstop was essentially a Customs Union in goods, or that Jeremy Corbyn was arguing in Parliament for a position which contradicted his lifelong commitment to allow Britain regulatory autonomy from a neo-liberal Union, are two examples of this cluelessness).

And augmenting further the negotiating disparity between the two sides, the Brits were pitched against a Union with 27 Member States, on a major issue of foreign policy, that uncharacteristically acted in remarkable unison and were led by one of the ablest and suavest European diplomats. As is clear, I do not agree with the very strategy adopted by the Union, but this was one occasion where the Union flexed impressively the muscles it has. (If only they could demonstrate the same unison and skill in dealing with Russia, China, the Middle East and the like.)

- Not surprisingly, also in terms of results rather than process, the parallels, to my mind, are striking. Here, too, it is not necessary to spell out the bevy of asymmetries that characterize the final agreement. We have done this elsewhere, even offering a non-Versailles approach and outcome (https://verfassungsblog.de/an-offer-the-eu-and-uk-cannot-refuse/). Think of the original Backstop, which would have denied the UK what, with some wishful thinking, they crowed about endlessly – the ability to negotiate their own trade agreements.

  But cutting to the chase and taking one of the principal features of the Northern Ireland Protocol, which European Member State would have accepted that a customs border run through its sovereign home territory? France perhaps? Germany? Italy? If ever there were a Versaillesque term, as transparent a poison pill as ever there was, it is here (and there are a few others). How a Tory government could have accepted such is, perhaps, a matter for psychologists.

The 'Versailles Effect' is not unique to the Brexit saga. If you ever wondered why the system of BITs (Bilateral Investment Treaties) is fraying, if not crumbling, it, too, is a victim of such. Dramatic inequality of negotiating arms, take it or leave it template treaties and scandalous asymmetries between the protections afforded investors from the capital-exporting countries as against the non-protection afforded public policies of the capital-importing countries. Does anyone wonder that we are witnessing a Revolt of the Masses against such regimes?

So yes, the UK, it can be said, brought all this on itself, so let them now stew in their own petard. And Great Britain is not some micro-state even if it acted without the gravitas, competence and sophistication characteristic of much of traditional British foreign policy even after its imperial heyday. It would, thus, be an insult to David to call this a David and Goliath situation. But truth is, even a far more sophisticated, coherent and determined UK at the negotiation table could not have done much else with the power odds so dramatically stacked against it. What leverage did they have when push came to shove? They ended up swallowing (and choking) on the dish offered to them by the Union – instead of a fried potatoes Backstop, boiled potatoes Northern Ireland Protocol. And they signed an Agreement binding in international law.

So, our latter-day Clemenceau has every moral right to say, 'But they agreed!'. And every legal right to hop up and down and repeat *ad tedium* and *ad nauseam*, 'we will not reopen a signed agreement!'. But highlighting the Versailles Effect is neither a moral/legal argument, nor a *plaidoyer* for some form of Brotherly Love in international relations. It is rooted in a cold calculus of self-interest. It is against this test of self-interest

that I am arguing that the Union blundered. Is it truly in the long-term interest of the Union to have lit the fuse and now let it burn to explosion? And let us not forget the ticking clock in the Protocol which gives Stormont the right to renounce in 2024. Should we not try to defuse that mine before it explodes? To me, what has happened and what is happening seems a repeat of the same 1919 error: short-term gain, long-term loss.

JHHW

In This Issue

This issue opens with two Letters to the Editors offering very different views on the recent Editorial entitled 'Cancelling Carl Schmitt'.

The Articles section of this issue opens with a contribution by *Bernard Hoekman* and *Petros Mavroidis*, who offer a fresh look at how the current crisis of the World Trade Organization (WTO) dispute settlement system could be overcome. They argue that the key to addressing the WTO's ongoing challenges is to revitalize the institution as a forum for rule-making. In the next article, *Antonio Coco* and *Talita de Souza Dias* tackle another pressing problem, namely whether there is a due-diligence principle in international law that applies to cyberspace. Surveying recent state practice as well as older case law, the authors argue that, regardless of whether new rules on 'cyber due diligence' have emerged, a mosaic of different, pre-existing obligations already applies in cyberspace by default. For his part, *Felix E. Torres* critically examines the approach of the European Court of Human Rights to protecting human rights in conflict-related scenarios. Questioning how suitable the Court's current approach is vis-à-vis mounting socio-economic challenges that usually arise during and after conflicts, Torres proposes an alternative way of looking at this problem. Concluding this section, *Johannes Hendrik Fahner* revisits the old but often neglected principle of *in dubio mitius* in treaty interpretation. Fahner makes the case that the principle has a place in contemporary international legal reasoning. He argues that it can help reduce the backlash against the legitimacy of international adjudicators.

The issue continues with an EJIL: Debate! *Gábor Kajtár* and *Gergő Barna Balázs* pose the question: Can attacks against embassies serve as a basis for the invocation of self-defence in international law? The two authors survey international case law as well as more than 700 instances of related state practice in order to answer this question. Finding that the invocation of a right of self-defence when a state's embassy has been attacked has been exceptionally rare in practice, they answer their own question with a no. In his Reply, *Tom Ruys* argues against this conclusion. While not disputing the empirical data gathered by Kajtár and Balázs, Ruys suggests that they may be subject to a different interpretation – namely that states are sceptical of the invocation of self-defence against armed attacks by non-state actors or, at the very least, that the gravity threshold for invoking such a right is much higher when non-state actors are the authors of an armed attack. Looking at the data gathered in this light, Ruys then goes on to suggest that there is nothing in theory or practice that bars the possibility

of a lawful exercise of self-defence if indeed one state were intentionally to attack the embassy of another state.

Continuing our EJIL: Debate! section, *Alec Stone Sweet*, *Wayne Sandholtz* and *Mads Andenas* reply to 'Walking Back Human Rights in Europe?' by Laurence Helfer and Erik Voeten, published in our issue 31:3. They question whether the ECtHR has actually been lowering standards of human rights protection in recent years. The authors argue that the outcomes of the High Level Conferences on the Future of the ECtHR in Brighton (2021) and Copenhagen (2018) did not pose a threat to the Court, while, on a different reading, very few judgments and dissenting opinions suggest walking back on human rights protection in favour of national governments. *Laurence Helfer* and *Erik Voeten* reply with a Rejoinder, where they argue against the criteria employed by Stone Sweet, Sandholtz and Andenas in coding ECtHR judgments as well as the narrow focus on the two High Level Conferences as instances of pushback against the Court.

Our Roaming Charges in this issue, contributed by *Agata Wiącek*, starkly expresses what may be an almost universal sentiment – the desire to re-enter all streets of life.

In our Critical Review of Governance section, *Fionnuala Ní Aoláin* critically assesses how a range of soft law instruments have shaped counter-terrorism policy since 9/11. She then goes on to examine how human rights can figure more prominently when implementing counter-terrorism soft law.

Next is a Book Review Symposium, which offers 12 commentaries on Martti Koskenniemi's massive new text, *To the Uttermost Ends of the Earth: Legal Imagination and International Power, 1300–1870*. To do it justice, we have assembled an eclectic and disciplinarily diverse group of scholars to critically reflect on each chapter. The aim of these commentaries is twofold – to appreciate, through the reflections of learned specialists, the sweep and scope of what is achieved in each part of the book, and to rigorously and meaningfully probe such an ambitious scholarly *opera d'arte*.

Our Last Page poem in this issue brings to light the work of a 17th-century poet, philosopher and nun from New Spain (now Mexico and the American southwest). With this poem on the hypocrisy of male–female relationships, *Sor Juana Inés de la Cruz* may well be considered one of the original #MeToo activists.

OCT

In This Issue – Reviews

This issue features two review essays and two regular reviews. We begin with *Carl Landauer*'s essay on *International Law's Objects,* edited by Jessie Hohmann and Daniel Joyce. Landauer comments on the book's call for a 'material turn' in international law, which he ties back to earlier discussions in material culture studies. He agrees with the book editors that objects can help bring vitality to the study of international law, but suggests we might go further in 'recruiting all of the senses [and not just the visual] in an engagement with the international legal order'. In our second review essay, *Ukri Soirila* and *David Scott* use *The Art of Mooting,* a guide centred on common law moot

competitions (and thus not your common EJIL 'review material'), as a springboard to engage critically with international law moot courts such as the Jessup. Drawing on their own 'conflicted experience with mooting', they highlight ways of using critical approaches to international law to teach mooting more effectively.

As regards the regular reviews, *Mai Taha* discusses Cait Storr's *International Status in the Shadow of Empire*, an account of Nauru's international legal histories, which highlights, in Taha's words, that 'imperialism is a process that continues to manifest itself in different ways'. *Fabian Eichberger* is not entirely convinced by Gus van Harten's *Trouble with Investment Protection,* whose 'sweeping critique of international investment law' he finds rather too sweeping.

CJT