EUROPE AND THE LEGAL REGULATION OF INTERNATIONAL RELATIONS

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ABSTRACT

Beginning in the late fifteenth century, the gradual opening up of Europeans to the world prompted them to examine what form their cohabitation in distant overseas spaces would take. Subsequently, the process of colonization forced Europeans to gradually extend to the entire world the principles and practices of an international law originally forged for countries of the old continent. The development of a legal framework on the world level consequently accompanied European expansion, over both land and sea, first in America and later in Asia and Africa. The concept of limited sovereignty in particular made it possible to introduce a hierarchy between states and to legitimize colonial conquests, while imposing a uniformization of norms and practices. From the late nineteenth century onwards, however, globalization and the increasing complication of the international system called the Westphalian model into question, in order to propose other legal traditions that favoured the emergence of a “mestizo” international law.

James Gillray, The Reception of the Diplomatique and his Suite, at the Court of Pekin, September 14, 1792. The ambassador of Great Britain, George Macartney, refused to bow before the Emperor Qianlong.

The emergence of international law assumed the existence of political entities enjoying a certain sovereignty, which maintained more or less sustained relations, mutually recognized one another, and accepted a specific series of rules enabling their coexistence. Their equality on principle was at the heart of what was called the Westphalian system, which was driven by a perpetual dynamic of negotiation and compromise. Beginning in the

sixteenth century, the rise of relations between European countries and the rest of the world, along with the expansion of the field of their rivalries, raised the question of the legal framework under which these new relations should fall. The development of contacts with non-European powers, along with colonization, were thus accompanied by a permanent adaptation of the rules presiding over international relations, in order to establish the principles of a cohabitation extending onto the global scale. If it is true, as Emmanuelle Jouannet has pointed out, that international law is “a pure cultural product of European (and more broadly Western) thought,” one must consequently examine the origins, forms, and aims of a process that questioned the very notion of Europeanization.

The Development of a Legal Framework on the World Scale

Beginning in the late fifteenth century, the unprecedented opening of Europeans to the world made it possible to raise a series of questions on how international law—which until then had gradually been constructed on the scale of Europe and its close periphery—was projected beyond the continent, and confronted with the broadening of the commercial, political, and diplomatic horizon in which states inscribed their activities.

The first upheaval affected the perception of the sea. During the Middle Ages, the high seas were a largely unexplored and unknown space, willingly seen as hostile. With the great European navigations, however, they in a way entered into history by becoming a complete whole which made circulation and commerce possible. The notion that the sea was generally a common good (*res communis*) was inscribed in Roman law. However, beginning in the Middle Ages, certain states claimed jurisdiction and control of navigation over the waters along their shores. These demands led to a gradual distinction between the high seas, which were free to all, and territorial waters, which fell under the sovereign's authority. The development of intercontinental navigation which resulted from the arrival of Europeans in America changed the game. The Treaty of Tordesillas (1494), which established that Spain and Portugal would share lands yet to be discovered, gave the Iberian powers primacy over global navigation. A series of questionings ensued regarding the freedom of the seas, symbolized by the opposition between *mare liberum*/*mare clausum* (free sea/closed sea). The central personality involved in the dispute was the Dutch jurist Hugo Grotius, who in 1609 published *Mare liberum* (*Freedom of the Seas*), in which he showed that the sea could not belong to anyone, was free by nature, and should be accessible to all for circulation and commerce. Grotius thus established the legal principles on which European maritime law of the high seas would later develop. In the early seventeenth century, the question of the freedom of the seas was not reducible to a simple academic or scholarly dispute. The development of trade on a global scale, as well as the ambitions of non-Iberian powers over navigation and commerce, gave maritime questions political, economic and legal import.

The encounter between Europeans and the American continent and its inhabitants required reflection on how to consider these new lands and the men inhabiting them. In the sixteenth century, the principle of appropriation by virtue of discovery led to an examination of the foundations of the European colonial enterprise, and of the systems in regions to which the Europeans traveled. The argument of the discovery of *terra nullius* (ownerless territory) was denounced as early as the sixteenth century, notably by the Spanish Dominican Vitoria. He believed that the Indians had their own authorities and had full ownership over their territory, such that neither the pope, nor the fact of being the first European to arrive there, granted sufficient rights to acquire their lands. At the same time, the reality of actual occupation was increasingly invoked to justify the founding of colonies. Lands said to be unoccupied were those not under cultivation, in other words, those that were not being used permanently. However, this justification proposed by the Spanish upon their arrival in America was later turned against them when the French, English, and Dutch arrived, particularly in the West Indies, where they settled on certain islands significantly called "*las islas inutiles*" (the useless islands) by the Spanish, and on which they had not established themselves. For the majority of jurists, only cession or occupation could establish legitimate property rights over foreign land, wherever it may be. These two scenarios related back to war, and allowed European jurists to justify the conquest of American lands. This was the central issue of the meeting organized in 1550 and 1550 in Valladolid, which focused on the connection between right of conquest, evangelization, and “just” war against those who were considered enemies of humanity. In reality, there was no lack of pretexts for European conquests. In the name of the natural sociability of humankind, the refusal of the Indians to offer their friendship to Europeans, or to trade with them, was considered as a just cause of war, just like the refusal to convert, or the fact of living like beasts. It is easily discernible how this type of reasoning was used by the Spanish conquistadors and the Portuguese, French, and English during their territorial conquests in America.

One of the difficulties of early colonial times encountered by the Europeans involved what form their cohabitation in the American world would take, for there was neither a transposition nor an extension across the Atlantic of the arrangements governing international relations in Europe. On the contrary, until the mid-seventeenth century lines of “friendship” were devised that demarcated the validity of European treaties. In the South, there was “the” line, first established at the latitude of Cape Bojador, later at the Tropic of Cancer, and finally, with increasing English motivation during the seventeenth century, along the Equator. In the West, the island of El Hierro in the Canary Islands, the Western border of the known world for the Ancients, marked the longitudinal limit. Two spaces were thus distinguished: one within the lines, placed beneath the seal of a law in which relations between states were governed by treaty arrangements; the other, beyond the lines, marked by the absence of law. This legal vacuum authorized the use of force, appropriations, disagreements, and claims which fueled rivalries and endemic violence. In this vast region of alegality, there was neither a state of war nor peace, as asserted by Marie de Médicis in the early 1610s: “beyond the line, and along the coast of America, [there is] no peace. When their subjects encounter one another, the stronger is the master.”

It was not until the second half of the seventeenth century that the authority of the law gradually extended to the Atlantic and America, through stronger presence of European powers on land and sea. This extension consequently made outlaws of the buccaneers living off predation. In an international society increasingly organizing itself around the cohabitation of sovereignties, pirates, who did not fall under the authority of any sovereign and who acted only according to their own interest, represented an uncontrollable violence that was less and less acceptable as states grew stronger. The European powers shared a common interest in eradicating piracy in order to ensure the security of their commerce. Extension of the principle of the freedom of the seas to Caribbean waters justified the Royal Navy’s efforts to eliminate piracy in the early eighteenth century. However, elsewhere in the world, the weaker presence of European war ships, or the support of certain states, made it more difficult to combat maritime predation. The argument of the freedom of the seas, which was at the heart of maritime law, subsequently became one of the levers used by the Europeans to try to establish their domination over the world's seas. In the 1750s, the jurist Emer de Vattel called for the unification of “Christian nations” against the Barbary corsairs of North Africa—“pirates”—in order to establish the security of Mediterranean commerce. At the turn of the eighteenth and nineteenth centuries, the United States took on the responsibility for the question of the liberty of the seas to challenge, by force of arms, the confines that the French, British, and Barbary pirates aimed to impose on their navigation in the Atlantic and Mediterranean. In the early nineteenth century, the prohibition of the slave trade by a number of European countries, including Great Britain and France, made slave ships illegal under international maritime law. In 1815, on the occasion of the Congress of Vienna, an international declaration denounced the slave trade, and permitted the British to use it as justification to track slave ships in the Atlantic.

European International Law Put to the Test by Non-European Worlds

In Southern Asia, the Europeans had to think of another legal framework to define their relations with local powers. Faced with ancient civilizations and highly populated groups in regions far from Europe, they were forced to negotiate as equals, and in China even to accept inequality on principle. Unlike America, it was not a matter of considering relations with local potentates from the viewpoint of the law of nations, but rather from that of relations between states by way of agreements and treaties. For that matter, this was also the case until the eighteenth century, for the installation of forts in Africa for the slave trade. The treaties concluded by the European powers with Persia, Indian princes, or the Emperor of China or Japan established a legal framework for the essentially commercial exchanges between the parties. Unlike what was taking place in America, the Europeans had to accept conditions that were contrary to the principles of their law of nations, such as restrictions in China and especially Japan on commerce and free circulation, which had nevertheless justified acts of war against the Indians.

The proclamation of the American Republic in 1776, followed by the political and diplomatic affirmation of the United States, demonstrates how the principles of international law had in a sense crossed the Atlantic. For American leaders, the central principles of international law, as they were presented by the major authors, especially Grotius and Vattel, provided the theoretical bases for their relations with European powers. During the 1790s, amid the tensions connected to the revolutionary wars, the Americans invoked a moral diplomacy respecting treaty commitments and the principles of natural law. It was along these lines that they defended their political neutrality, by developing a legal argument to continue their trade even as the European powers were at

war. In the early nineteenth century, it was the turn of Latin American republics to invoke the European authors of the law of nations in establishing their international relations.

Yet Europe did not have a monopoly over international law, understood in the sense of a body of laws governing relations between sovereign political entities. There existed elsewhere in the world—and this beyond any contact with Europeans—more or less developed rules that could be likened to international law, and that were necessary for establishing and maintaining relations between states. It was nevertheless European public law (*jus publicum europaeum*) that founded international law, and imposed itself outside of the continent. This spread can be explained firstly by colonization and its legacy in former colonies in America, for whom adopting the rules of European international law demonstrated an accession to the full rank of sovereign power, possessing an international legal personality. Next, it should be noted that European international law adapted to the changing realities of the world thanks to its conceptual framework and sophistication. This mutability was coupled with a political, economic, and cultural domination which began during the sixteenth century, and continued until the twentieth.

From this point of view, the nineteenth century marked a fundamental stage. The pretention to civilize the world, or in other words to Europeanize it, was based on a colonial discourse that distinguished civilized spaces (essentially Europe and America) from ones which were not (Africa and Asia), and which justified the implementation of unequal relations imposed by the former on the latter. International law legitimized and accompanied the enterprise, simultaneously imposing itself as an essential marker of this dichotomy—only countries which fell within it were civilized—and as a civilizing instrument at the service of colonial states. This involved a questioning of the very foundations of the law of nations, henceforth seen, as highlighted in 1889 by the German jurist Franz von Holtzendorf, "as a product not of nature, but of civilization," one that was neither timeless nor universal, but historic and specific to certain states.

According to the historian Antony Anghie, the concept of sovereignty was at the heart of the process. To justify colonization without allowing its victim states to themselves invoke international law, it would ideally be necessary to deny them any sovereignty. Yet since the Europeans were dealing, on the ground, with organized societies whose political structures were sometimes very close to theirs, they got around this difficulty by presenting a wide range of statuses and limited sovereignties that involved varying forms of domination. Europeans were hence able to conclude treaties and agreements with the states and peoples of Asia or Africa, but to do so without recognizing them as equals, which allowed them to establish their superiority while exporting their legal norms and understanding of the international system. It should be noted that after the First World War, the League of Nations—far from calling the principles of colonization into question—consolidated colonial empires by introducing a system of mandates, which was explicitly in line with this conception of conceded sovereignty: class A mandates (countries from the former Ottoman Empire) could enjoy a certain autonomy, with the task of the mandatory, France or Great Britain, being to guide them onto the path of independence; Class B mandates (former German colonies from Central and Eastern Africa) would be administered, while attending to the upholding of the rights and interests of the peoples; Class C mandates (former German colonies from Southwestern Africa, New Guinea, and the Pacific) would be classed as simple colonies placed under the exclusive laws of the mandatory.

With the universalization of norms in mind, European international law set itself the goal of extending to the entire world the practices and codes specific to the diplomacy of the old continent. It was a long process from the Congress of Vienna in 1815, which sought for the first time to raise the question in legal terms, to the Vienna Convention on Diplomatic Relations of April 18, 1961—which in the heart of the Cold War immediately became one of the most ratified texts in the world—although the central issues were clear: to define the legal framework in which diplomatic activity should take place, to codify aspects of protocol, and to rule on privileges (immunity, extraterritoriality, etc.). The uniformization of diplomatic rules, tools, and practices, as well as the adoption of a common language and grammar, were some of the elements present in the globalization of international relations that asserted itself during the nineteenth century, and which came to an end following decolonization. The "unequal" treaties signed between 1858-1862 by the major Western powers with China following the Second Opium War, as well as with Japan, provide a good illustration of this process. In addition to discriminatory economic and commercial clauses, they contained a series of arrangements that imposed the establishment of institutionalized diplomatic relations, at least as the Europeans understood it: the right of Westerners to establish permanent representations in Peking, the obligation for the Chinese and Japanese governments to equip

themselves with a Ministry of Foreign Affairs or an equivalent body, and the adoption of protocols in use in the "civilized" world. China no longer imposed on foreign ambassadors the *Kowtow* ceremony requiring them to bow before the emperor, and in 1861 created a governmental office in charge of external relations (the *Zongli Yamen*), which after the suppression of the Boxer Rebellion was succeeded in 1901 by a genuine Ministry of Foreign Affairs. In 1876 China also began to maintain its first permanent embassies abroad. Beyond this, it was the Eurocentric representation of the international system—that of the dominant powers of the time—to which China and Japan had to consent, by force for the former, and choice for the latter.

Things evolved fundamentally after the First World War, with the legal framework of international relations henceforth being provided by the League of Nations, which inscribed its activities within a universal logic, and no longer a solely European or even Western one. It also emphasized, at least in theory, the principle of equality of all nations before the law, whether large or small. The LN thus took on responsibility for the project of unifying the codes and practices of a henceforth globalized diplomacy: the negotiations did not conclude, but were significantly taken up again, this time successfully, in the regional context of the American continent, with the signing in 1928 of the Havana Convention on Consular Agents and the Havana Convention on Diplomatic Officers. This example clearly illustrates the emergence and development over the first half of the twentieth century of an increasingly "mestizo" international law, to use Arnulf Becker Lorca's expression, in which the role of European law was not exclusive, even if it remained essential. Recent research insists on the role of non-European internationalist jurists, notably from Latin America and even Japan, and on the contributions made by new legal cultures to the construction of a law that was henceforth laid claim to and appropriated on a global scale: the Hague Conference of 1907, which for 140 days brought together more than 250 delegates from 44 countries across the globe, for instance put Argentinean and Brazilian jurists on centre stage. Decolonization would only confirm this phenomenon and served as a reminder that international law, as long as it ceased to be the privilege of dominant powers, was a tool available for everyone's use, one which could serve the interests of the strongest as well as support the demands of the weakest.

The evolution of international law after 1945, and even more so after the end of the Cold War, consecrated the disappearance of the Westphalian interstate model, a process which had already begun at the beginning of the century. The increase in international actors, from NGOs to simple individuals, along with the expansion of the field to many new areas, has led to the development of specific legal orders (human rights, environmental law, labour law, etc.), which answer to specific logics, and present an increasingly fragmented international law. For the most part, these transformations took place within the framework of the UN or international organizations with a universal mission, and it is not easy to detect the role played by Europe, especially considering that with regard to foreign policy, it is still made up of sovereign states which often have difficulty adopting common positions. This was amply clear during the US military intervention against Iraq in 2003, which a certain number of European countries, including France and Germany, deemed illegal under international law, while others deemed it legitimate, and were not far from rehabilitating the old medieval notion of a just war, in order to justify the fight against the dictatorial regime of Saddam Hussein in the name of democracy. Nevertheless, the European Union built itself from the beginning through law, and bases a large part of its power on its ability to impose norms. It has defended human rights for a long time, and more recently its hobby horse of environmental rights, thereby marking its attachment to an international legal order based on values which are also its own. It is to be hoped that in this area more than any other nationalist reflexes and economic considerations do not lead it to renounce its commitments.

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