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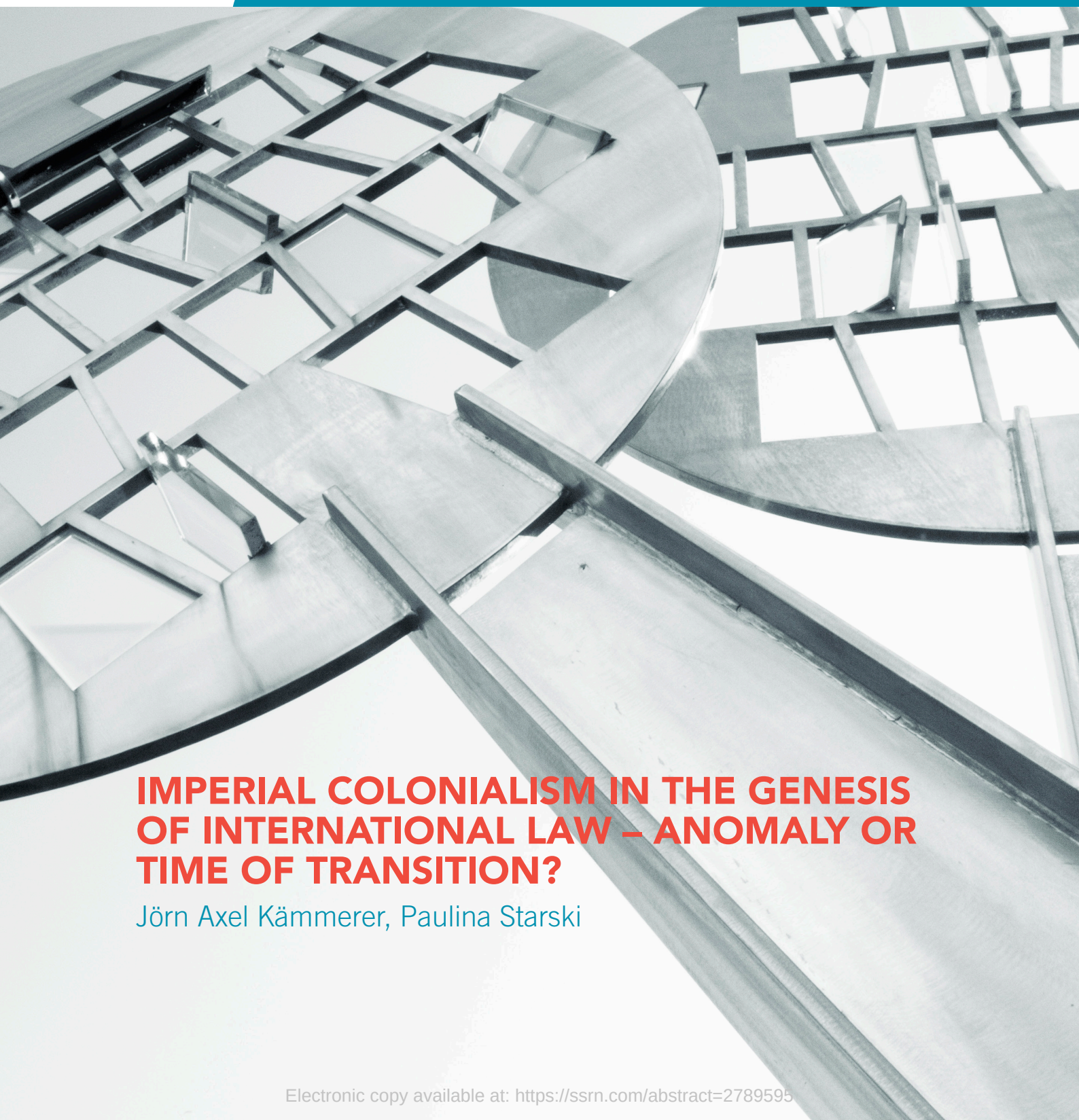

IMPERIAL COLONIALISM IN THE GENESIS OF INTERNATIONAL LAW – ANOMALY OR TIME OF TRANSITION?

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ABSTRACT

Drawing on the works of Alexandrowicz and Grewe this paper intends to shed some light on the role played by colonialism in the genesis of present international law. The central question is whether the international law of the imperial era (which culminated in the late 19th century) must be regarded an anomaly in the evolution of international relations, a temporary "accident" that was eventually overcome by the formation of an universal community of States half a decade later or whether colonialism, right on the contrary, has to be seen as a time of transition thanks to which an until thence regional order, referred to as the *Ius Publicum Europaeum*, and later as the *Droit public de l'Europe*, evolved to a universal one. Alexandrowicz' and Grewe's answers to these questions appear to be diametrically opposed. Even more important than to assert who of them proved to be right is to understand why these scholars arrived at such conflicting conclusions, which is the focus of this contribution.

KEYWORDS:

colonialism, post-colonialism, international law, history of international law, global history, Ius Publicum Europeum, intercivilizational perspective, Eurocentricism of international law

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Imperial Colonialism in the Genesis of International Law – Anomaly or Time of Transition?

Jörn Axel Kämmerer/ Paulina Starski

1. The Controversy: Alexandrowicz vs. Grewe

The colonial era casts its shadow even upon the present day, remnants being the North-South divide and continuing debates over reparations for colonial injustices. Much has been written about the dark side of colonialism: exploitation, discrimination, marginalization and exclusion of "indigenous" peoples from the making of law. It is astonishing, however, how little scholarly attention has been paid to the function of colonialism in the genesis of contemporary public international law. Once clarified, this function may better explain some of the shortcomings and peculiarities of the global order and at the same time show the way towards potential remedies. The central question, in a nutshell, is as follows: Must the international law of the imperial era (which culminated in the late 19th century) be regarded an anomaly in the evolution of international relations, a temporary "accident" that was eventually overcome by the formation of an universal community of States half a decade later? Or was colonialism, right on the contrary, a time of transition thanks to which an until thence regional order, referred to as the *Ius Publicum Europaeum*, and later as the *Droit public de l'Europe*, evolved to a universal one?

The term "European" has no exclusively geographic connotation but encompasses the Americas, too, countries that emerged from pre-imperial and pre-Westphalian European colonization and settlement. Yet, with only few exceptions[1], the 19th century colonizers were located on the European continent. That these powers were claiming the exclusive right of shaping the global legal order is undisputed. Likewise, it may hardly be called controversial that today's universal international law carries a strong European imprint – which is why, from a historic perspective, we may call it "eurogenetic": "Now there is one truth that is not open to denial or even to doubt, namely that the actual body of international law, as it stands today, not only is the product of the conscious activity of the European mind, but also has

[1] Among these exceptions were the USA (especially as from 1898) and Japan (as from 1895).

drawn its vital essence from a common source of beliefs, and in both of these aspects it is mainly of Western European origin."[2] But does this continuity also extend to the pre-colonial era? Imperial international law pursued (if not always stringently) a pattern of social inclusion but also exclusion.[3] The "members" of the law-making international society decided on who was entitled to participate in it, but they also denied non-members the capacity to establish their own, equally valid orders, claiming a monopoly for themselves. Non-European entities and peoples were reduced to objects by the design of imperial international law.

Exclusivity claims had been alien to European public international law in the pre-imperial period. This openness may be indicative of the idea of legal relativism or pluralism, in the sense that independent legal systems were acknowledged as equal; but it might as well bear testimony of Europeans being aware of the existence of a pre-colonial, global legal order: If such an order existed, then legal pluralism would have been nothing to bother about. If the latter assumption is true then the shift towards an exclusionist regime of imperial colonialism involved the break-up of what had been a common global order until then and hence has to be interpreted as a step backwards. Otherwise, it would have to be seen, right on the contrary, as the cradle of a truly global order. Obviously both suggestions are diametrically opposed. From the former perspective – which we may refer to as "constriction theory" – 20th century decolonization is the return to the original, "normal" state of global legal relations. For the antagonist "expansion theory" colonization first unified international law, while only decolonization eventually induced the element of universal participation into it.

Awareness is increasing among international legal scholars that the history of international law cannot be told from a European perspective only. For example, Yasuaki Onuma suggests to approach the international law narrative from an "intercivilizational perspective."[4] Fassbender and Peters deserve support in their assumption that "the Eurocentric story of

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[2] J. H. W. Verzijl, *International Law in Historical Perspective*, Vol. I (Leyden: Sijthoff 1968), 435 et seq.
[3] M. Koskenniemi, *Gentle Civilizer of Nations* (New York: CUP 2002).
[4] Y. Onuma, 'When was the Law of International Society Born?', *Journal of the History of International Law* 2 (2000), 1, 7; 'Towards an Intercivilizational Approach to Human Rights', *Asian Yearbook of Int. Law* 7 (1997), 21 et seq.; R. P. Anand, 'Review Article on Onuma Yasuaki's 'When was International Law Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective'', *Journal Hist. Int'l Law* 6 (2004), 1-14, 13.

international law has proven wrong because it is incomplete".[5] Indeed it appears to be quite urgent to lay the foundations for a "truly global history of international law".[6] The concept of "world history" heads in the same direction[7]. These perceptions are largely shared by the authors of this article and if their position is that international law as a universal order is a product of the 20th century this is nothing but a reverence to the legal autonomy of non-European powers in what is the history of international legal relations.

a) The Constriction Theory

For "constrictionists" "[t]he Family of Nations must be considered a continuous community […]".[8] In other words, an international law community that had existed before colonization was disrupted by it. The law of the high and late colonial era is therefore regarded as an anomaly: a temporary deviation from an already existent international law – natural law – of an international legal community. One of the most eminent advocates of this theory is Alexandrowicz.[9] He insinuates the existence of a "pre-colonial" international law which did not exclude, or if it did, to a lesser degree, and was therefore "more universal" than in the late 19th century. Positivism is attributed a crucial role in the context of what is perceived as a "constriction": Sometime in the 19th century, the Europeans "captured" international law and transformed it from a value-based system rooted in natural law thinking to a positivist legal system. In a nutshell, the precept of positivism enabled the parties to determine (even arbitrarily) the applicable law and the actors that were permitted to participate in its making. In other words, law was considered law because it was set by the bodies declared competent to do so. This very fact was considered as the decisive trigger for the exclusion of non-European powers.

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[5] B. Fassbender/A. Peters, 'Introduction', in A. Fassbender/ A. Peters (ed.), *The Oxford Handbook of the History of International Law* (Oxford: OUP 2012) 1, 2.

[6] B. Fassbender/A. Peters, 'Introduction' 2012 (note 5), 1 (2). Cf. regarding the "global history" approach B. Mazlish/R. Buultjens (eds.), *Conceptualizing Global History* (Boulder: Westview Press 1993); J. Osterhammel, 'Global History in the national context: The case of Germany', *Global History Österreichische Zeitschrift für Geisteswissenschaften* 20 (2009), 40 et seq.

[7] D. Northrop, 'The Challege of World History', in D. Northrop (ed.), *A Companion to World History* (West Sussex: Blackwell Publishing Ltd. 2012), 1 et seq.

[8] C. H. Alexandrowicz, 'Treaty and Diplomatic Relations between European and South Asian Powers in the Seventeenth and Eighteenth Century', *RdC* 100 (1960), 207 (316).

[9] C. H. Alexandrowicz, 'Doctrinal Aspects of the Universality of the Law of Nations', *BYIL* 37 (1961), 506 et seq.; 'The Afro-Asian World and the Law of Nations (Historical Aspects)', *RdC* 123 (1968), 123 et seq.; 'Treaty and Diplomatic Relations' 1960 (note 8), 207 et seq; *An Introduction to the History of the Law of Nations in the East Indies* (Oxfors: Clarendon Press 1967).

The narrative of constriction and consistency has been endorsed by other scholars, both lawyers and historians,[10] albeit with some differences in tone and nuances. According to Fisch international law had existed for a certain time as a law of the Europeans but was never international law per se, but a special form of it. He stresses that international relations had existed amongst non-European entities as well as between participants of the Ius Publicum Europaeum and non-participants.[11] For Orakhelashvili a universal and secularized international law had existed since the 15th century, to be replaced with a racist and chauvinistic international law during imperialism.[12] The question remains what evidence these authors can offer for the existence of a global international legal order prior to colonialism. Alexandrowicz (whose views are cited here as an example) conceives international law as rooted in the equality of human beings and their rationality,[13] finding support for this natural law perception in the works of Grotius[14] and Gentili.[15] Both dealt with the subjectivity of non-European entities and assigned the capacity to conclude international agreements to them.[16] Alexandrowicz's objective is not just historical accuracy, but his assumptions are also guided by programmatic and normative concerns:[17] If pre-colonial international law has to be regarded as inclusive in nature in contrast to its positivist counterpart of the 19th century, then today's international law – a product of the colonial era –

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[10] N. Singh, *India and International Law* (New Delhi: Chand 1969); T. O. Elias, *Africa and the Development of Int. Law*, 2nd ed. (Dordrecht: Nijhoff 1988); S. Laghmani, *Histoire du droit des gens du "jus gentium" impérial au "jus publicum europaeum"* (Paris: Pedone 2004); O. V. Butkevych, 'History of Ancient International Law: Challenges and Prospects', *Journal of the History of International Law* 5 (2003), 189 (208 et seq.); P. Singh, 'Indian International Law: From a Colonized Apologist to a Subaltern Protagonist', *Leiden Journal of International Law* 23 (2010), 79 et seq. R. P. Anand, 'Review' 2004 (note 4), 11. However, Anand appears to assume rather the existence of a pluralist international law than to follow the idea of a pre-colonial international legal order, see R. P. Anand, *International Law and Developing Countries*, 2nd ed. (Dordrecht: Nijhoff 2011), 2.

[11] J. Fisch, *Die europäische Expansion und das Völkerrecht* (Wiesbaden: Steiner 1984), 499.

[12] A. Orakhelashvili, 'The Idea of European International Law', *EJIL* 17 (2006), 315 (336, 347).

[13] Vgl. A. Anghie, 'Die Evolution des Völkerrechts: Koloniale und postkoloniale Realitäten', *KJ* 2009, 49 (50).

[14] *Grotius* saw certain dangers in the conclusion of contracts with "nonbelievers", but did not rule such a possibility out: "In considering treaties, it is frequently asked, whether it be lawful to make them with nations, who are strangers to the Christian religion; a question, which, according to the law of nature, admits not of a doubt. For the rights, which it establishes, are common to all men without distinction of religion," H. Grotius, *De iure belli ac pacis*, Book II, Chapter 15, VIII (Lugduni Batavorum: Sijthoff 1919). Herein Grotius differentiates between trade and military pacts, the former are generally permitted, the latter only if they are not directed against a Christian party, see Book II, Chapter 15.

[15] A. Gentili, *De Iure Belli Libri Tres*, Book III, Chapter IX (Oxford: Clarendon Press 1933), 397 et seq.

[16] R. P. Anand, 'Review' 2004 (note 4), 6.

[17] J. Pitts, 'Empire and Legal Universalisms in the Eighteenth Century', *American Historical Review* 2012, 92 (99).

is indeed flawed and "true" international law must in fact be the pre-colonial one. This elementary idea is also echoed by authors who devote their work to a critical analysis of post-colonialism and whose works are generally – and irrespective of their in fact distinctive approaches – labeled as "Third World Approaches to International Law".[18,]

b) The „Universalization Theory"

The opposing view is that a plurality of social orders existed before the era of colonialism, one of them being the Westphalian-born "Droit public de l'Europe". From this perspective international law had been a European invention and had always remained a purely European matter, being associated with a "club" of European powers (and their American off-springs). While this club continued to exist through the whole phase of colonialism, its rules ceased to apply as "articles as association" and were henceforth conceived as binding on extra-European entities as well – which were eventually admitted to the until then highly exclusive society of law-makers when decolonization came. It was in particular Grewe[19] who advocated this "eurogenetic" character of international law. Grewe understands the history of international law as a sequence of empires: Spanish, French, and British.[20] While he admits that some elements of a "global" international law were present in the pre-colonial era, e.g. agreements between European and non-European entities, he underpins that legal contacts where they existed did not lead to participation of a non-European entity within the international legal order of their European treaty partner.[21] Less attention is paid to the idea that as a consequence, the same must in return be true for non-European powers, namely "membership" in their proper "clubs" with limited participation. We may label this approach

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[18] The summarized B. S. Chimni, 'Third World Approaches to International Law: A Manifesto', 8 *International Community Law Review* 8 (2006), 3 et seq.; A. Anghie/B. S. Chimni, 'Third World Approaches to International Law and Individual Responsibility in Internal Conflicts', *Chinese Journal of International Law* 2 (2003), 77 et seq.; O. C. Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?', *International Community Law Review* 10 (2008), 371 et seq.; K. Mickelson, 'Rhetoric and Rage: Third World Voices in International Legal Discourse', *Wisconsin International Law Journal* 16 (1998), 353 et seq.; B. S. Chimni, 'The past, present and future of international law: a critical third world approach', *Melbourne Journal of International Law* 8 (2007), 499 (50 et seq.).

[19] W. G. Grewe, 'Vom europäischen zum universellen Völkerrecht', *ZaöRV* 42 (1982), 449 et seq.; L. Oppenheim, *International Law,* Vol. I, 2nd ed. (London: Longmans Green Co. 1912), 46. Critically A. Orakhelashvili*,* 'Idea' 2006 (note 12), 338.

[20] M. Koskenniemi, 'Histories of International Law: Significance and Problems for a Critical View', *Temple Int'l & Comp. Law Journal* 27 (2013), 215 (219).

[21] W. G. Grewe, *The Epochs of Int. Law* (Berlin: DeGruyter 2000), 8 et seq. Ferner W. Wengler, *Völkerrecht* I, (Berlin: Springer 1964), 107.

as the "universalization theory" because its advocates presuppose that colonialism amounted to a global dissemination of until then mainly European international law. Colonialism may therefore be regarded as ambiguous: From this perspective, on the one hand, it oppressed, sidestepped and destroyed non-European orders and the membership of extra-European powers in their respective "international" alliances. On the other hand, the universal application of the formerly exclusively European law that it entailed prepared the ground for the later inclusion of the colonized entities. They would never been admitted to the "family of nations" if that family had remained European; but they could have remained within their own community if the Europeans had let it survive. To put things right, the "universalization theory" does by no means regard the colonial era as a "necessary evil" on the way to a truly universal international law. Yet, it interprets the 19th century a trifle more ambivalently than the constriction theory does. At the same time the "positivist turn" is given only little attention.

2. An "Intellectual Trap"?

In claiming that a universal law international had existed before the Europeans destroyed it, the "universalists" risk getting caught in an "intellectual trap": Assuming that decolonization only just mended what colonialism had torn apart, pre-colonial events and entities are benchmarked against contemporary legal standards: statehood, international law, sovereignty, and many others, standards that reach well beyond mere natural law. Anghie, who conceptualizes the history of international law not in the Kantian sense as the story of mankind's advancement and progress, but in terms of repeated and continued oppression,[22] uses concepts such as sovereignty in order to serve the interests of the formerly oppressed.[23] However, these legal standards are undeniably eurogenetic, even if one holds that the same cannot be said of the very universal order. If inconsiderately claimed to apply to pre-colonial facts and entities, there is a danger that contemporary, Europe-borne standards will be imposed on peoples that, unlike the Europeans, were not aware of these notions. What Grewe and the constrictionists have in common is that they bestow very little interest in any legal

[22] M. Koskenniemi, 'Histories' 2013 (note 20), 223.
[23] A. Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', *Harv. Int.'l L Journal* 40 (1999), 1 (70). Cp. M. Koskenniemi, 'Histories' 2013 (note 20), 225.

evolution outside Europe, but their reasons for doing so diverge considerably from each other. While Grewe appears to be disinterested in what from today's perspective was doomed to vanish anyway, Alexandrowicz's perspective on history is determined by the ideal of emancipation of subjugated peoples. To a certain extent we are all doomed to think in "European notions of relevance."[24] The blind spot of the "universalists", however, consists in ruling out the existence and singularity of other non-European "transcommunitarian" systems and integrating them into the system of international law against themselves. To assume that all relations of (and with) non-European communities were determined by an "international law" must, after all, hold up to the reasonable suspicion of merely projecting European ideas.[25] This is also true to a certain extent for Anand and Elias.[26] Those who, like Anghie, chastise colonial exclusion as a unilateral appropriation of international law by the Europeans run the risk of replacing one evil with another through a well-intentioned but nevertheless imposed inclusion.

Yet, the inappropriateness of judging pre-colonial matters after post-colonial standards provides no evidence that the constrictionists are wrong in establishing that "international law" had been truly international before imperialism started. We must therefore ask if what we know about pre-colonial history allows for the conclusion that there was in fact something like "international law", even if the extra-Europeans would not have called it by this name, unknown to them. Defining "international law" as any form of "transcommunitarian" rule-setting and decision-making would not suffice: No notice would then be taken of the self-perception of non-European entities (especially those untouched by European influence), and the nature of legal relations between European and non-European entities where they existed would remain unclarified. The very existence of (infrequent) agreements between Europeans and non-Europeans cannot be taken as an evidence of a universal legal system. Neither may common features of legal relations, which may be coincidences. So even if the relations among non-European pre-colonial entities carry all the features we may require for "international law", this would by no means prove that both their legal relations and those

[24] M. Koskenniemi, 'Histories' 2013 (note 20), 222.
[25] Y. Onuma, *A Transcivilizational Perspective on International Law* (Leiden: Nijhoff 2010), 182; M. Koskenniemi, 'Histories of International law: Dealing with Eurocentrism', *Rechtsgeschichte* 2011, 152 (168).
[26] M. Koskenniemi, 'Histories' 2011 (note 25), 168.

among European powers are the same: manifestations of a unified, comprehensive legal system connecting the peoples of this world, independently of whether they were known to each other or not.[27]

3. Terminology as a Key? Some Remarks on the International Law of Europeans (Ius Publicum Europaeum or Ius Publicum Europaeorum)

Appreciating the importance of colonialism for the genesis of international law requires a closer examination of its topoi and the degree of its European imprint. As mentioned further above, even Grewe and Alexandrowicz agree on international law's eurogenetic nature. For Grewe international law is a European system, which by expanding geographically at some point (colonialism) and later broadening its range of subjects (decolonization) reached out globally. Thus, for him, Europe is the birthplace of international law. For Alexandrowicz "international law" was genuinely European only during a very limited phase. Questions about the European imprint on international law are also questions about its nature. Alongside "international law" – a term going back to Bentham[28] – one can also find the notions of "ius gentium", "law of nations", "droit des gens" and even "droit entre les gens"[29] – some of them being used synonymously, others not. Sovereignty and inter-nationality are generally regarded (by scholars raised in the European tradition) as axioms of international law, as is reflected by Oppenheim's standard definition: International law is the law which applies between sovereign and equal states and rests on a consensus between them.[30]

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[27] Cf. also critique by E. Jouannet, 'Comment on Onuma Yasuaki's When was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective', *J. Hist. Int'l Law* 6 (2004), 27 (30).
[28] H. Suganami, 'A Note on the Origin of the Word "International"', *British Journal of International Studies* 4 (1978), 226 (230); Armitage, 'Globalizing Jeremy Bentham', *History of Political Thought* 32 (2011), 63 et seq.
[29] Cp. Suganami, 'Note' 1978 (note 28), 229; H. Steiger, 'Universality and Continuity in International Public Law?', in T. Marauhn/H. Steiger (eds.), Universality and Continuity in International Public Law (Den Haag: Eleven 2011) 13 (29 et seq.).
[30] L. Oppenheim, *International Law* 1912 (note 19), 44.

While the widespread apotheosis of the Peace of Westphalia as the "birth hour of international law"[31] should rather be seen as a myth,[32] it is undeniable that the treaties of Münster and Osnabrück (1648) as well as Nürnberg (1649/50) changed some of the paradigms of the legal relations among European powers in making – for the first time – the contours of sovereign statehood and reciprocal commitments as emanations of a genuinely European peace order apparent. Nearly 300 years had, however, to pass until sovereign statehood was fully and generally established in Europe: Germany, as the Holy Roman Empire of German Nation, retained a "pre-Westphalian" status until 1806; elsewhere, dynastic governance structures with extensive rights of interference and suzerain relations were not uncommon until the era of colonial imperialism. For example, the Prussian King only gave up his sovereign rights in the canton of Neuchâtel in 1848 (while the ties with the city remained intact until 1857).

But there has never been a consensus as to what extent international law is generically European law. This lack of consensus also becomes apparent in the varying terminology (and the varying perceptions of each term). The notions "droit public de l'Europe" or "droit public européen" were rather common – and were used, for example, in the Treaty of Paris from 1856, which objective it was to secure the balance of powers in Europe[33] – admittedly at a time when European ambitions had long started to encroach upon other regions of the world. Furthermore, we find the Latin term *Ius Publicum Europaeum*, now shunned by some authors (such as von Bogdandy and Hinghofer-Szalkay) – mainly due to what is seen as its ideological usurpation by Carl Schmitt) – as "a bit scary".[34] Schmitt blended solid historical facts about the genesis of international law with war and "Großraum" apologetics in the early post-WW II days against the background of the events of the first half of the 20th century.[35] As so often with Schmitt ambiguity seems to be intended, and it remains unclear whether he understands "international law" and *Ius Publicum Europaeum* as synonyms or whether one is part of the other. Furthermore, his concept has a flaw or blind spot that is quite common for

[31] F. v. Liszt, *Völkerrecht* (Berlin: Haering 1898), 11 et seq. Critically B. Teschke, *The Myth of 1648* (London: Verso 2003); W. Preiser, *Macht und Norm in der Völkerrechtsgeschichte, Über die Ursprünge des modernen Völkerrechts* (Baden-Baden: Nomos 1978), 9.
[32] M. Koskenniemi, 'Histories' 2011 (note 25), 154.
[33] R. P. Anand, 'Review' 2004 (note 4), 5.
[34] A. v. Bogdandy/S. Hinghofer-Szalkay, 'Das etwas unheimliche Ius Publicum Europaeum', *ZaöRV* 73 (2013), 209 (236 et seq.).
[35] C. Schmitt, *Der Nomos der Erde im Jus Publicum Europaeum* (Köln: Greven 1950).

international legal scholars of his generation in that he is ignorant of affairs beyond the European sphere of power. The very idea of "European international law" paralleling other systems of law created by non-European actors is alien to him. Inclusion and exclusion do matter for Schmitt but only as paradigms of legal relations between European powers.

Exclusion of non-Europeans and a global claim of the European powers to rule are characteristics of European imperial colonialism. The change that the Eurogenetic order has insofar undergone is reflected in Fisch's notion of *Ius Publicum Europaeorum* – international law of (and for) Europe evolved to an international law of Europeans.[36] It must again be underlined that "Europeans" includes States which had emerged (especially in the Americas and Oceania) out of the Spanish Empire or British colonies in the 19th century. They, however, are not at the center of focus here, especially since they, with few exceptions, were not colonial powers. That exclusion of non-Europeans did not remain without exceptions and that the Europeans reserved the right of inclusion for themselves in individual cases (we may even hold that decolonization was nothing but a gradual, collective inclusion) only just amplified its force. What at first sight might appear inconsequential and seem inconsistent is actually a logical consequence of the prerogative that the Europeans claimed for determining who was entitled to enter the realm of "their" *Ius Publicum* as a "member". Insofar as the 1856 Treaty of Paris granted the Ottoman Empire rights "à participer aux avantages du droit public et du concert européens",[37] it evidenced the self-perception of European powers as a kind of "club"– a "concert européen", in the words of that Treaty –, whose articles of association were the "droit public européen".[38] The Ottoman Empire became officially – either declaratory or constitutively – a member of this club by force of the Treaty of Paris[39] and thus an integral part of what was thence the international law community.[40] Since this was one of few, isolated cases, "membership" was solemnly bestowed and Europe had a long common history with the Turks, one would be ill-guided in regarding the Treaty of Paris as the beginning of a de-Europeanization of this club. If some authors are right in observing that

[36] J. Fisch, *Expansion* 1984 (note 11), 499.
[37] Traité de paix de Paris, 30th March 1856.
[38] A. v. Bogdandy/S. Hinghofer-Szalkay, 'Unheimliche' 2013 (note 34), 226.
[39] *G. Gozzi*, 'History of International Law and Western Civilization', *International Community Law Review* 9 (2007), 353 (361).
[40] Cp. J. Fisch, *Expansion* 1984 (note 11), 285.

it marks at least the end of congruity between international law and Christianity,[41] then it rather provided for the contrary: As soon as Christian faith ceases to serve as a potential door opener to the "club", then the Europeans may discretionarily agree on new standards for admittance, such as "civilization" (or what they take for it).

It is hard to determine the point in time when "civilization" was losing its religious core. The admittance of the Ottomans to the "club" was by no means uncontroversial. Lorimer regarded it as an absurd anomaly – a necessary consequence of his premise that half-civilized peoples and "semi-barbarous" states (among which he counted the Ottoman Empire) and native tribes had no right to participate.[42] Ironically enough, the Ottoman Empire later became a signatory to the Berlin Congo Act – despite having no territorial interest in Central Africa. In sum, expansions of the "European club" remained, however, singular and were in any case arbitrary, and with the exception of the USA and the Ottoman Empire, none of the "newcomers" were invited to the "concert", the inner circle of European powers. Entities acknowledged as sovereign States in the course of the 19th century were Haiti, formally independent since 1804 but burdened by France with unbearable financial transfers for this, and Libera, which emerged in 1847 – both of these communities of former slaves. But to what extent diplomatic relations between European states with "others" such as the Amharic Monarchy can be seen as emanations of their rapprochement to the club is highly doubtful. Most non-European powers, including the never colonized China, Japan, Afghanistan, Persia, Siam, were neither formally nor effectively admitted to the "European club".

These analyses seem to confirm two assumptions: First, in the 19th century a then exclusionary *Ius Publicum Europaeum* or *Europaeorum* existed with a limited circle of participating actors which only selectively opened its doors to non-European entities. Second, as a legal order it had existed over centuries in Europe as regional system regulating the relations between European states. During that period it was exclusive yet not exclusionary. In

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[41] J. C. Bluntschli, *Das moderne Völkerrecht der civilisirten Staaten* (Nördlngen: Beck 1868), 17, 55 et seq. Others argue that treaty relations between the Ottoman Empire and European powers had already existed previously (A. Nussbaum, *A concise history of the law of nations* (New York: Macmillan 1950), 191); in the 16th century there was an ordenance between Francis I of France and Suleiman the Great (G. Gozzi, 'The Particularistic Universalism of International Law in the Nineteenth Century', *Harvard International Law Journal Online* 52 (2010), 73 (78 et seq.); 'History' 2007 (note 39), 362 et seq.

[42] J. Lorimer, *Institutes of the Law of Nations*, Vol. I (Edinbourgh: Blackwell 1883), 216, 239 et seq.

any case what governed the relations between European States had by no means been designed as an *ius inter omnes gentes*. Even if we accept the idea of natural law applying to any sort of trans-communitarian agreement, we must conclude that in legal practice, and from the perspective of its legal players, international law was in essence a European order.

4. Pre-colonial Universal Legal Order or Pluralism of Systems?

Even the above does not deal a deathblow to the constriction theory. European international law could also be conceived as a part of a universal *ius inter omnes gentes* in terms of an overarching system encompassing non-European sphere or legal systems and those of the Europeans. Structural congruities between European and non-European entities and historical contacts between them might be taken as indicators of its existence. However, neither of them sufficiently supports the existence of an overarching uniform system: Congruities can also be merely parallel phenomena (similar to what we see in the evolution of otherwise unrelated species), and the mere conclusion of agreements does not amount to a system *per se*. Hence, natural law remains as the only imaginable common basis; but its relationship with international law is anything but clear.

The idea of a juxtaposition or pluralism of systems is not new but was echoed by the works of many law scholars between the 16th and the 18th century.[43] Montesquieu argued that the "wildlings" established relations between individuals and societal entities by ways of their proper law: "Toutes les nations ont un droit des gens; et les Iroquois mêmes, qui mangent leurs prisonniers, en ont un. Ils envoient et reçoivent des ambassades, ils connaissent des droits de la guerre et de la paix". However, he proceeds as follows: "[L]e mal est que ce droit des gens n'est pas fondé sur les vrais principes."[44] Note the use of the definite article in this context: Unlike scholars of later generations, Montesquieu does not criticize the lack of legal principles as such but regrets that their principles applying outside the European sphere were not "the right" ones. Wheaton acknowledged the existence of an "international law" outside that sphere even in the 19th century, while regarding it to be inferior to the European one.[45] It is quite striking that the term "international law" is used here with regard to non-European

[43] G. Gozzi, 'History' 2007 (note 39), 366.
[44] C. L. Montesquieu, *L'esprit lois,* liv. 1, ch. 3 (Paris: Garnier 1922).
[45] H. Wheaton, *Elements of Int. Law* (Boston: Little, Brown 1866), 17 et seq.

systems. This would feed Alexandrowicz's universality thesis had the authors not stressed the inferiority of legal relations outside the European realm: This would hardly make sense if the legal relations were the same. Putting aside dogmatic questions and looking at legal contents only, one will find congruent and corresponding phenomena in both the European and non-European sphere – a fact that may endorse the constriction theory (in that homogeneity is indicative of a single order) just as well as the universalization theory (in that every order, or system requires the presence of those features). Khadduri remarks in this context: "In each civilization the population tended to develop within itself a community of political entities – a family of nations – whose interrelationships were regulated by a set of customary rules and practices, rather than being a single nation governed by a single authority and a single system of law. Several families of nations existed or coexisted in areas such as the ancient Near East, Greece and Rome, China, Islam and Western Christendom, where at least one distinct civilization developed in each of them. Within each civilization a body of principles and rules developed for regulating the conduct of states with cine another in peace and war."[46]

Alexandrowicz evidences early congruities between European and Indian legal concepts encompassing principles guiding the law of the sea, the idea of a *mare liberum* or rules governing the protection of aliens.[47] The *Arthashastra* (a book on the law of the State published around 200 AD) or the *Manusmriti* (presumably published around 1000 AD) – just to pick out a well-documented example from the Indian cultural sphere – mention the concepts of treaties as well as the obligation to fulfill them, the inviolability of embassies and the distinction between belligerents and non-belligerents. Counting these scriptures among the law of treaties, of immunities and consular relations or international humanitarian law[48] may foster their deeper understanding from today's perspective. We cannot even rule out the fact that people inhabiting the European continent knew about *Arthashastra* 1800 years ago and that it later inspired Grotius[49], that India and Europe learnt to borrow certain legal constructs from each other. Even this would not bear evidence of a universal system of international law

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[46] M. Khadduri, *The Islamic Law of Nations of Shaybain's Siyar* (Baltimore: Johns Hopkins Press 1966), 2 et seq.
[47] Cp. R. P. Anand, 'Review' 2004 (note 4), 7.
[48] A. Verdross, *Völkerrecht*, 5th ed. (Wien: Springer 1964), 79; A. Wegner, *Geschichte des Völkerrechts* (Stuttgart: Kohlhammer 1936), 6; A. Orakhelashvili, 'Idea' 2006 (note 12), 328.
[49] Cp. P. Singh, 'Indian International Law: From a Colonized Apologist to a Subaltern Protagonist', *Leiden Journal of International Law* 23 (2010), 79 (86).

prior to the 19th century. But this lending and borrowing would be marked by asynchrony: If the same, or like, legal phenomena emerge at different moments in human history (the freedom of the seas more than a millennium earlier in India than in Europe), there can be no talk of a communal order. Even where parallelism correlates with simultaneity, there is little evidence of legal spheres of Europeans and non-Europeans permeating each other; they simply remained parallel phenomena:[50] "[T]here scarcely existed a common norm (the equivalent with today's international law) among such regional worlds or civilizations."[51] What Alexandrowicz successfully establishes are coincidences and simultaneities but not coherence between non-European and European concepts and not even systematic reciprocal influences between these.[52]

Simultaneity and commonalities do not make one common legal order.[53] A legal community, an *ius inter omnes gentes*, cannot be imagined unless all actors have a sense of affiliation. Core concepts upon which European international legal thinking rests, such as statehood, sovereignty or the equality of sovereign states (concepts which admittedly did not take final shape until the 19th century), were often unknown to non-European actors and would have – this can be reasonably assumed – in most cases not been accepted by them. Even if the early Qing emperors should have had knowledge of Grotius' scholarship (which cannot be entirely ruled out), this could have hardly shaken up their sinocentric ideology and concept of society – a model that also influenced Korea and Vietnam.[54]

Yet, here the "constrictionists" may point to intercontinental legal relations and argue that, if the afore-mentioned differences did not prevent the peoples from establishing them, a common, overarching law presumably exists all the same. However, as already mentioned further above, the conclusion of agreements between European and extra-European powers was a rare occurrence. More striking is that the parties often disagreed on the meaning of an already fixed agreement – other than the "simple" ones promising friendship or free trade –,

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[50] J. Fisch, 'Power or Weakness? On the causes of the worldwide expansion of European international law', *J. Hist. Int'l L.* 6 (2004), 21 (21); Y. Onuma, 'When was the Law of International Society Born?', *Journal of the History of International Law* 1 (2000), 2 (1 et seq., 63).
[51] Y. Onuma, 'Inernational Society' 2000 (note 50), 11.
[52] Y. Onuma, 'Inernational Society' 2000 (note 50), 61. Critically R. P. Anand, 'Review' 2004 (note 4), 8.
[53] See Y. Onuma, 'Inernational Society' 2000 (note 50), 61 et seq..
[54] It should be noticed as well that *Grotius* was aware of similar practices from the east Indian area during the publication of his work *Mare Liberum*, R. P. Anand, 'Review' 2004 (note 4), 8)

the reason behind this being the incompatible of concepts (such as State, sovereignty, borders, etc.). Most intricate were treaties allegedly regulating cession of territories or the transfer of sovereignty. If the concept of sovereignty is alien to one of the partners to the agreement, and if we assume that sovereignty as a both fairly recent and rather complex idea is not an emanation of natural law, we will find it difficult to explain why that party should have been able to transfer it after all – and the other party to acquire what from the partner's perspective is not transferable because of being non-existent. For the sake of colonization, European powers often resorted to the conclusion of agreements with "indigenous" powers. Had they been vested with sovereign powers and capable of ceding them – as the "constrictionists" tend to claim – then the (alleged) universality of international law would have fueled rather than hampered colonialism. The legal position that the indigenous were in fact incapable of concluding anything like treaties and their land could be occupied without further ado[55] only gained momentum in Europe after 1850, in Germany more than in Britain, and it never remained undisputed.

The Treaty of Waitangi (1840), in which the exercise of authority over Aotearoa/New Zealand was settled,[56] is a good example of insurmountable divergences between two conceptual worlds. The same is true, give or take, for "treaties of protection" frequently concluded between European and African powers during the second half of the 19th century. In many of these cases the European powers took advantage of the ignorance of their "treaty partners" with regard to European legal concepts and their unawareness of their connotations.[57] Even scholars that support the idea of constriction admit that overseas nations did not operate with notions of "sovereignty".[58] On the reverse, they frequently refer to one

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[56] Language summaries in English und Māori: http://www.nzhistory.net.nz/politics/treaty/read-the-treaty (retrieved 17th March 2016). The word „kāwanatanga" can be translated with "government" (in the institutional sense) or possibly even with "rule". The idea of sovereignty was foreign to the Māori as was the difference between public and private ownership. For details see P. G. McHugh, *The Māori Magna Charta. New Zealand Law and the Treaty of Waitangi* (Oxford: Oxford University Press 1991), 4; M. S. R. Palmer, *The Treaty of Waitangi in New Zealands's Law and Constitution* (Victoria: Victoria University Press 2008) 60 et seq., 102 et seq.; Waitangi Tribunal, Wai 1040, Conclusions, 10.2.

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[58] Cf. Anghie, 'Evolution' 2009 (note 11), 51.

specific passage of the ICJ judgment on Right of Passage over Indian Territory[59] allegedly intimating the Court's recognition of a pre-colonial universal legal order. The ICJ admittedly pointed out that the validity of the 1779 treaty must "be judged upon the basis of practices and procedures which have since developed only gradually".[60] What may appear strange to who upholds the principle *tempus regit actum* is in fact nothing but an attempt to cope with India's objection that no mutually agreed textual version of the treaty between the Maratha ruler and Portugal existed. Likewise, the Court did not address the question whether a system of international law existed at the time when the agreement, which was later overruled by a Eurocentric legal order,[61] was concluded.

Natural law in the end builds Alexandrowicz' conceptual refuge. If we claim international law to constitute a system, natural law hardly satisfies the system criteria, and even less could mere contacts.[62] Moreover, just as positivism is not exclusive "by nature", the concept of natural law is not necessarily inclusive. It essentially constitutes a social projection that other cultural spheres may appreciate and apprehend in a manner that is different from the European eye – not surprisingly, considering the obvious differences in their religious and cultural foundations. Early, pre-imperial European international legal models that were founded on natural law precepts were in fact inclusive insofar as they could virtually have applied to all peoples and social entities. We may refer to Bluntschli's concept of "cultural neutrality", which can also be found in the works of Pufendorf.[63] The hoped-for inclusion, however, never really happened, and if it had, it would again have been rooted in legal thinking of culturally enlightened Europeans.

We can conclude that prior to its global outreach "international law" must have been a genuinely "local" European product – just one of many regional orders that existed in the world.[64] Prior to the imperial era, public international law and Droit public de l'Europe were the same. Even though the "constriction theory" has been found here to be less persuasive,

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[59] ICJ, *Case concerning Right of Passage over Indian Territory (Portugal v. India)*, Judgment of 12 April 1960, ICJ Reports 1960, 6 (35). This is pointed to by R. P. Anand, 'Review' 2004 (note 4), 8.
[60] ICJ, *Case concerning Right of Passage* (note 59), 37.
[61] A. Orakhelashvili, 'Idea' 2006 (note 12), 335.
[62] Similarly R. P. Anand, 'Review' 2004 (note 4), 7.
[63] G. Gozzi, 'History' 2007 (note 39), 358.
[64] Y. Onuma, 'International Society' 2000 (note 50), 64; R. P. Anand, 'Review' 2004 (note 4), 7.

one of Alexandrowicz's findings deserves being highlighted: There had been a time when that European order, even though it has been identified here as Eurocentric, was much more open, benevolent and relaxed as regards the recognition of alien peoples, their law and the legal relations between them than in the late 19th century. [65]

A still open question is how to conceptualize and categorize legal relations that thanks to that openness sometimes existed between European and non-European entities. Steiger qualifies that "law between political powers" as a "normative order of relationships between a number of political powers, independent of each other, in whichever time or region".[66] This brings him to the assumption of an "inter-power normativity".[67] Wengler speaks of an international law in a sociological sense.[68] Fisch tells legal relations within the realm of international law from "other international relations".[69] Onuma coined for legal relations between communities before international law became universal the terms "intercommunity law" or "inter-societal law".[70] Such terminologies are helpful but questionable,[71] since any effort of classification appears to render the very premise absurd: What extends beyond a system cannot generally constitute a legal system in and of itself. For the same reason a bifocal approach would not be persuasive. The problem discussed here is rather theoretical insofar as the matters dealt with in those agreements were generally plain ones. We may refer to those agreements that transgressed the limits of the respective legal orders as trans-systemic or "system-transcending".

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[65] J. Pitts, 'Empire' 2012 (note 17), 95. Auch M. Vec, 'Universalization, Particularization, Discrimination', InterDisciplines 2 (2012), 79 (86).
[66] H. Steiger, 'From the International Law of Christianity to the International Law of the World Citizen', *Journal of the History of International Law* 3 (2001), 180 (180 et seq). Similarly R. P. Anand, *Developing Countries* 2011 (note 10), 2.
[67] Steiger, 'Universality' 2011 (note 29), 33.
[68] W. Wengler, *Völkerrecht* 1964 (note 21), 107.
[69] J. Fisch, *Expansion* 1984 (note 11), 286.
[70] Y. Onuma, 'International Society' 2000 (note 50), 58, with reference to G. Abi-Saab, 'International Law and International Community', in: R. Macdonald (ed.), *Essays in Honour of Wang Tieya* (Dordrecht: Nijhoff 1994), 31 et seq.
[71] Critically R. P. Anand, 'Review' 2004 (note 4), 2, 7.

5. Conclusion

The idea of a pre-colonial universal legal order is doubtless appealing in stressing the immoral, the misguided and the flawed in the exclusion of non-Europeans powers in the era of imperial colonialism. If it is true that non-European communities had already enjoyed the status of legal subjects in pre-colonial time, their general exclusion (not the one relying on the deliberate abandonment of sovereignty, which "constrictionists" may find easier to accept) would lack not just legitimacy but also legal consistency. The 19th century would then appear as a unilateral termination of a tacit or implicit covenant (on a global community) by Europeans, as a paradigmatic switch from universalism to particularism. Decolonization, on the reverse, then appears as the indispensable correction of an evolution lead astray, purging international law from a stigma inferred through imperial colonialism. By conceiving the *Ius Publicum Europaeum* merely as an instrument of colonial subjugation[72] (and not as a transitional phase on the way to an universal international law) scholars show concern for the colonized but as shown above, they risk getting tangled up in European thinking more than ever, even where they resort to the rather diffuse concept that is natural law. The pre-colonial self-image of non-European entities, unaware of that idea and uninfluenced by Christian and European thought is thus obscured. Furthermore, the constriction theory does not succeed in casting moral condemnation into legal standards: None of its supporters seriously claim that 19th century standards were void because of having been agreed upon by European powers only. Otherwise, natural law would have been insufficient as a benchmark for their invalidation.

The perception that colonialism was a first step (unintended by the colonizers) in the universalization of what until then had been a genuine European international order is more persuasive but a little blunter on the moral scale. It still allows to unravel the discriminatory nature of colonial international law whose correction appears to be not only a moral and political but also a legal command. In particular, this theory draws attention to the often neglected indigenous perceptions of law and also on the ambivalent nature of decolonization,

[72] R. P. Anand, 'Review' 2004 (note 4), 5 et seq.

which is that its conditions were set by the Europeans. It ironically was decolonization that rendered a return of the colonized to "their proper" law impossible. This "post-colonial paradox"[73] helps explaining why conflicts in former colonized regions continue to rumble on and why the cleavage between North and South is still present. How to mitigate these unwelcome repercussions of universalization is an open question that cannot be dealt with at this point. From a legal and political perspective imperial, 19th century colonialism involved discrimination, violence and brutalization. From the perspective of system theory and system evolution it marked a phase of transition and an ambiguous step towards universalization of a eurogenetic order that even in its universal shape has been bearing until present the imprint of the colonial days.

[73] J. A. Kämmerer, 'Das Völkerrecht des Kolonialismus', *VRÜ* 39 (2006), 397, 414 et seq.; 'Colonialism', in: *MPEPIL Online*, paras. 23 et seq [retrieved 17th March 2016].

Cover: Imbalanced World, 1996, Veronika Dell'Olio (photo: Miriam Aziz)

"Essential to our concept was the establishment of a connection to the work and objectives of the institute. In view of the diversity of the research tasks concerned, we have attempted to highlight an overarching idea that can be understood as the institute's mission. We see this as the ideal of peaceful relations between peoples on the basis of an internationally validated notion of justice…. The depicted sculpture…[symbolizes] an imbalanced world in which some peoples are oppressed while others lay claim to dominance and power. The honeycomb form of the circular disks denotes the [international] state structure. Glass parts … [represent] the individual states …. [The division] of the figure … into two parts [can] be interpreted as the separation of the earth into two unequal worlds. The scissors-shaped base, on the one hand, makes the gap between them clear, on the other hand, a converging movement of the disks is conceivable…. The sculpture [aims] at what is imagined – the possibility of the rapprochement of the two worlds." [transl. by S. Less]

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