A genealogical analysis of religious discourses in international law: deconstructing power dynamics and knowledge production, with an interrogation of reconciliation with the sinosphere

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A Genealogical Analysis of Religious Discourses in International Law: Deconstructing Power Dynamics and Knowledge Production, with an Interrogation of Reconciliation with the Sinosphere

Kaiser-Valentin Quo

A thesis submitted to the S. Rajaratnam School of International Studies, Nanyang Technological University in partial fulfilment of the requirements for the Master of Science in International Relations

Singapore – April 2024

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Summary

The enterprise of international law, in both its classical and modern forms were, in essence, an enterprise to expand and entrench the hegemonical narrative. One cannot divorce the conceptualisation and understanding of the authoritative institution from its colonial history.

Insofar as the present available literature has provided conceptualisations on how the European colonial powers have structured global governance, this dissertation attempts to be an aperture through which the hermeneutics of the traditions of the Eurologocentrism – that is, the logic of Western European thought, which includes a Greco-Roman and the Judeo-Christian tradition – and international law intersect. In this dissertation, I problematise the conceptual framework of modern international law in examining the normative vocabularies which gives structure to the law of nations.

A major contention of this dissertation is that prior examinations have obscured important, if not necessary, factors which are relevant to producing alternative approaches to the discipline. In neglecting the historiographies and genealogy of thought, one inadvertently succumbs to the essentialist representations of Western Europe and the Orient. By employing a deconstructive hermeneutical genealogy approach, I provincialize the colonial historiography to invert the continuous narratives and demonstrate the diverse conditions in which imperial settings had operated and continues to persist.

Given the historical context, a fundamental element to be found in Eurologocentrism is a Judeo-Christian tradition. In my attempt at reconciling the body of international law with the Sinosphere, I will elucidate many parallels between ancient China and early modern Europe. Hence, contrary to mainstream scholarly perspectives, I contend that a reconciliation with the Sinosphere is feasible. I conclude with policy recommendations to generalise the international legal body to even wider applicability.

Chapter One

Introduction

"*We are not content with negative obedience, nor even with the most abject submission. When finally you surrender to us, it must be of your own free will. We do not destroy the heretic because he resists us: so long as he resists us we never destroy him. We convert him, we capture his inner mind, we reshape him. We burn all evil and all illusion out of him; we bring him over to our side, not in appearance, but genuinely, heart and soul. We make him one of ourselves before we kill him. It is intolerable to us that an erroneous thought should exist anywhere in the world, however secret and powerless it may be*."

Orwell, Nineteen Eighty-Four

§1.1 The Colonial Origins of International Law

Carl Schmitt, Crown Jurist of the Third Reich, wrote in his reflection on occidental rationalism: "Civilisation was synonymous with European civilisation."[1] The most recent scholarship of the now equally notable postcolonial author, Gayatri Spivak, who in exposing the Western academy as complicit in the political realm of oppression through epistemic violence, challenged the conventional representation of Europe as the principal agent of modernity and criticised the standard of civilisation as we understand it today. Because the "coloniser constructs himself as he constructs the colony," the dichotomous memory of colonial-era legacy continues to persist in Europe and non-European parts of the world.[2]

Indeed, within the ongoing study of jurisprudence, the European monopoly over the idea of civilisation continues to animate discussions of international conduct. Certainly, the European imperial involvement in both the classical and modern conception of international law cannot be disputable. Recent historiography has provided rich critical analyses of international law as a redeeming project of governing and transforming non-European peoples. JHW Verzijl asserts this Eurologocentricism: "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 drawn its vital essence from a common source of beliefs, and in both of these aspects it is mainly of Western European origin."[3]

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[1] Carl Schmitt, The Nomos of the Earth (GL Ulmen tr, Telos 2003); 86.

[2] Gayatri Chakravorty Spivak, A Critique of Postcolonial Reason: Toward a History of the Vanishing Present (Cambridge: Harvard University Press, 1999), p. 203.

[3] JHW Verzijl, International Law in Historical Perspective, 10 vols, Leiden: AW Sijthoff, 1968, Vol I, pp 435-436.

The idea of being "civilised" is hence a received – that is, precolonial – with a modernist – that is, Western European – consciousness. In this conception, then, two important questions arise as implications. Firstly, what were the conscious activities and common sources of beliefs of Western Europe? Further problematics occupy this question, such as why efforts to decolonise the colonial-era ideologies often come face with resistance and the milieu that provides Western Europe its "Western Europeanness." Afterall, such geographic descriptors are limited in their discursive powers. The second question is an old one: Is it possible for the postcolonial world to construct a new international law that is liberated from the colonial origins?

My broad argument, here, is that the appropriation of Christianity by the Western European colonial powers not only shaped the development of international law in historical context, but the transmutation of the Western European experience as a universal truth into the discipline has institutionalised a set of pervasive structures that continuously subordinates non-Europeans, and of particular concern to this paper the Sinosphere, at various stages of international law.

§1.2 Vitoria's Problem of International Law

By way of introducing my argument, I take two examples from Francisco de Vitoria. Often sharing the title "father of international law" alongside Alberico Gentili and Hugo Grotius, he expounded upon the equality of individuals and states applicable not only to those of Christendom and of Europe but also extended to societies of the Amerindians (or "De Indis" as he termed.) for they too, had a Creator.[4] This concept was later to be inherited by the Preamble to the United Nations Charter, which reads in full as follows: "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."[5] Later, in acknowledging the reasons that the Amerindians possessed, Vitoria insisted: "Although the aborigines in question are not wholly unintelligent, yet they are little short of that condition, and so are unfit to found or administer a lawful State up to the standard required by human and civil claims. Accordingly they have no proper laws nor magistrates, and are not even capable of controlling their family affairs."[6]

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[4] Two lectures, translated as 'On the Indians Lately Discovered' and 'On the Law of War Made by the Spaniards on the Barbarians' are collected together in one volume, Franciscus de Victoria, *De Indis et de Ivre Belli Relectiones* (Ernest Nys ed., John Pawley Bate trans., Washington, DC: Carnegie Institution of Washington, 1917), p. 123. Since 'Francisco de Vitoria' is more commonly adopted in the literature, I have yielded accordingly.

[5] Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 (1948).

[6] Vitoria, *De Indis*, p. 161.

Here, I would like to point attention to the phrasing that Vitoria employs: "standard required by human and civil claims." In writing this, Vitoria arrives at concluding there exists a deficient order within Amerindian affairs by establishing a distinction between the Spanish and the Amerindians. The fundamental premise of his argument can be found in his usage of the expression "barbarians" and "Saracens" as opposed to the Christian Spanish, hence, the former lacking the inherent capacity to wage a just war.[7] In such categorical characterisations and in a way reflecting the biblical idea of "thou shalt love thy neighbour," Vitoria introduced colonial occupation as a way of bettering the heathens.

§1.3 Definitions

At a minimum, the Salamancan epistemology remains bordered and undisrupted.[8] Consequently, we find the traditional employment of religion – in particular, Christianity – to have aided and reproduced the normative framework of an international law of nations. "Civilisation" and "progress" have come to acquire a unitary meaning, synonymous to the rhetoric of the Western European enterprise.

Here, I begin to unsettle a few definitions to situate recurring themes within a larger conceptual system divorced from Eurologocentricism. Firstly, in referring to "Christianity," I describe the totality of Catholic and Protestant institutions and belief, without discrediting the wider influence that Catholicism had in the wider events.

Secondly, in civilisational geographical determinants. I submit that the morphogenesis of the geo-cultural term of "Western civilisation" is antinomic and seriously disabled.[9] However, because Western European-American civilisation is universally referred to as "the West," I will employ it for brevity. Similarly, I underscore my engagement in a conscious process of oversimplification by conflating the notion of a "Sinosphere" with the East Asian cultural sphere – that includes Chosôn Korea, the Ryukyu Kingdom (now Okinawa), Vietnam, Siam (now Thailand), Sulu (now South Philippines), Burma, and Laos – as I am constrained by space considerations. Nonetheless, these simplifications do not indicate any arbitrariness on my part.

Religion, as the historian Jonathan Smith understands it, "is solely the creation of the scholar's study" and "created for the scholar's analytic purposes by his imaginative acts of

[7] Ibid., p. 130.
[8] In a narrow sense, the School of Salamanca refers to the sixteenth- and seventeenth-century Iberian Scholastic theologians who were, in effect, led by and influenced by Francisco de Vitoria's formulation of natural law.

[9] For more, Refer to Philippe Nemo What is the West

comparison and generalisation."[10] Similarly, Talal Asad wrote: "There cannot be a universal definition of religion, not only because its constituent elements and relationships are historically specific, but because that definition is itself the historical product of discursive processes." In other words, an academic definition of the concept alludes to be only a foundation of the dispenser of that meaning. Nevertheless, in any event, it would be irresponsible not to hazard a working definition before proceeding to examine its provisions. Precisely because he employs a "methodological polymorphism" method, Paul Hedges proposed reference in his book, "Understanding Religion," is operational in my paper.[11] Religion, for him, is a shifting signifier, "tied to a chain of meanings, implicated in regimes of power to exclude, for example, race or gender, and negotiated in discourse."[12] Hence, while the classification of Confucianism as a religion has been debated for centuries, its anthropology and institutions warrant its categorisation as a religion for the scope of this study.

§1.4 Method: Of Deconstructing Hermeneutics and Genealogies

I term my theoretical approach a deconstructive hermeneutical genealogy. While there exist important differences within all three trajectories, a unification allows the possibility towards counterposing the dominant perspectives. It will be useful to clarify the terms briefly.

> Deconstruction: Destructs a previously assumed principle through literary analyses. It reveals the equivocations within the text and rejects an absolutist view.
>
> Hermeneutics: As a discipline, it refers to the interpretation of texts informed by our suppositions. On the simplest level, analytical inquiry and interpretation merely involves exploring the possibilities already projected by our existing comprehension.
>
> Genealogies: Michael Clifford's language, using Michel Foucault as an intellectual backdrop, is so insightful that it is appropriate to quote him at length: "Genealogy exposes the nonessentiality of the political subject through a historical analysis of its constitution…The exposure of political subjectivity is effected by recognising in it the axial interplay of discursive practices, power relations, and processes of subjectivation. Yet what is exposed in [through] this analysis is not the 'origin' of the political subject, understood as the transcendental conditions of its appearance. Rather, what genealogical critique exposes is the Entstehung of the political subject, its emergence as an event."[13]

[10] "Map Is Not Territory." In Map Is Not Territory: Studies in the History of Religions, 290-291. Leiden: E. J. Brill.

[11] P.8

[12] Ibid., p. 226

[13] Michael Clifford, Political Genealogy After Foucault (New York and London: Routledge, 2001). P. 151

The first part of my thesis provides a case comparison between the Westphalian state-system and the Sinitic tributary system. In the first instance, the sovereign was the Judeo-Christian God, whose commands were acknowledged by Christians. I aim to explore the juxtaposition of classical sovereignty against the insights of John King Fairbank, the renowned American Sinologist, whose work on the Chinese world order developed the "tributary system" theory. Concluding, I will demonstrate "hierarchy as sovereignty" in which a return to a vertical authority pays tribute to sovereignty as classically formulated.

I discuss in the second part of my thesis the concept of "jus cogens" (or compelling law) as a fundamentalist narrative. Here, I revisit the preparatory work of the Vienna Convention on the Law of Treaties and examine the evolving narrative of progress dependent upon theological substantiation in response to historical circumstances. I will deconstruct a hermeneutical narrative of biblical substantiation and contend that the abstract universalism facilitates domination.

Given the parallel foundations of both the Western and Eastern just war narrative, I attempt to reorient the literature in analysing the phenomenology. I argue that the emancipatory determinations, instead, arbitrarily enslaves the oppressed. The narrative essence is rooted in the perspective of "the other," and hence, entrenches the institutionalised structural violence deeper. Before I proceed, I should underscore that in no way does this dissertation provide a comprehensive historical account. No single analysis is capable of doing so. Rather, I intend to initiate comparative explorations between these two systems.

Chapter Two

Waking the Dead Horse: Hierarchy as Sovereignty

Let every person be subordinate to the higher authorities, for there is not authority except from God, and those that exist have been established by God.

Rom., 13, 1

§2.1 To be "Sovereign"

Emerging in the thirteenth century was a set of problems specific to the issue of sovereignty: a continuous process to broaden the concept of sovereignty, concerning the definition of sovereignty, the means to acquire sovereign authority, the exercise and limits of operative sovereign power, and so on. But more alarming is that, as Jean Elshtain has traced, when the thirteenth century French legists who were aligned with the centralising French monarchy conflated the term sovereignty "as a characterisation of political rule, analogous to God's sovereignty."[14]

For one, the term transcended its ecclesiastical origins and assumed what most would refer to as a secular legal significance for the international society as we understand it present-day. Already in the eighteenth century, the French political philosopher Jean-Jacques Rousseau prophesised: "the Treaty of Westphalia will perhaps forever remain the foundation of our international system."[15] An extant of present literature within the study of international history and relations would validate the endorsement of Rousseau: "realistic conventional" and "liberal" historical perspectives as to how the abstract blueprint was necessitated by wartime exhaustion, neo-Schmittian *jus publicum europaeum* postulations, and of Kissingerian politics: "The Peace of Westphalia became a turning point in the history of nations because the elements it set in place were as uncomplicated as they were sweeping. The state, not the empire, dynasty, or religious confession was affirmed as the building block of European order. The concept of state sovereignty was established."[16]

Second, by these acts which had modelled the authority of a civil sovereign as a representative of the Judeo-Christian God, endowing them with *potentia dei absoluta*, presented an erosion of the absolutist connotations that were originally associated with being

[14] Sovereignty: God, State, and Self. By Jean Bethke Elshtain. New York: Basic Books, 2008. p. 24

[15] Jean-Jacques Rousseau, Translated by C.E. Vaughan, A Lasting Peace Through The Federation of Europe and The State of War, London: Constable and Company Limited, 1917, p. 55.

[16] Henry Kissinger, World Order, New York: Penguin Press, 2014., pp. 26-27.

sovereign.[17] When Thomas Hobbes constructed the authority of the Leviathan, he was doing so upon the model of an omnipotent Being on earth. Just as the penitence of the sinner in Christianity is a precondition towards salvation, an escape from the Hobbesian state of nature required men to renounce their "pride" to a "Mortall God". It is no accident that Hobbes took from the Bible the image of the state as a Leviathan, the insidious sea serpent who is "king over all the children of pride" (Job 41). Among the architects of sovereignty as an articulation of dispersion of the plural I also find Aristotle's caution against *polykoirania* in Metaphysics. In his tirade he juried, "[i]n no wise shall we Achaeans all be kings here. No good thing is a multitude of lords; let there be one lord, one king."[18] (Iliad 2.200-206). In the syntactic construction of the compound terms "Westphalian sovereignty" or "state sovereignty," then, the modifiers "Westphalian" or "state" inadvertently distorts the meaning of the constituent, "sovereignty." This interposition of infallibility and incontestable power upon juristic bodies, popes, monarchs, and states is now construed as an absence of any undue restriction over individual body polities. It is precisely the semantic ambivalence and indeterminacy of this language that does injustice to the concept and robs it of its meaning.

The genealogical exegesis that has pervaded scholarly discourse does provide the premise for this section. At this point, the inseparability of sovereignty from its theological pole should not come as a surprise. Hence, it becomes necessary to question the notion of sovereignty – one that predates jurists of the likes of Grotius and Vattel? Do we remain tethered to this perpetually developing yet resolute genealogy, or has the historical spectre of sovereignty undergone an erosion in credibility? I will devote this chapter to envisaging hierarchy as sovereignty, and illustrate that when viewed in this light, ancient China embraces the concept of sovereignty more that contemporary system of states.

§2.2 The 'Myth' of Westphalia

The formation of the international system as it is understood today can, hence, be characterised by the appearance, at the Peace in 1648, of one fact with two contradictory aspects: the reorganisation of the political power in Continental Europe.

The Thirty Years War was a conflict in and between the polities of Europe. Most historical accounts of the War begin with presenting the revolt of the Protestant Bohemians against the Catholic Habsburg rule in 1618, which triggered the particularist actors, specifically Denmark, the Dutch Republic, France, Sweden, as well as German princes to identify with the Bohemians. These actors felt it was necessary to "refute the hegemonical aspirations of

[17] William J. Courtenay, Capacity and Volition: A History of the Distinction of Absolute and Ordained Power (Bergamo, 1990).

[18] Kirk, G.S. (1985). The Iliad: A Commentary. Books 1-4. Cambridge, U.K.: Cambridge University Press. (2.200-206)

the papacy and the Holy Roman Empire to recreate a single Christian imperium."[19] This account is, however, an oversimplified but necessary account as a precession for the first following argument.

The chief political ideas behind the Peace of Westphalia, then, focused on replacing the traditional Empire-Papacy monopoly over spiritual and political power with a different type of system of governance. Proper, the Peace of Westphalia represented two treaties – that is, the Treaty of Münster (in the case between the Holy Roman Emperor and the King of France) and the Treaty of Osnabrück (in the case between the Holy Roman Emperor and the Queen of Sweden) – signed in 1648 to terminate the imperial overlordship and the ambitions of the Habsburg for universal monarchy.

Here, I would also caution that the term "Westphalian sovereignty" is, in itself flawed for a multiplicity of reasons but mainly, one locates little to no references to sovereignty within the Peace terms. Rather, the Treaties of Westphalia included a number of provisions that are inconsistent with the Westphalian sovereign structure as we know it today. For example, while conveyance of Western Pomerania, the port of Wismar, the archbishopric of Bremen, and the bishopric of Verden were granted to Sweden, Article 10 of the Osnabrück Treaty reads that the transfers were to remain "in perpetual and immediate Fief of the [Holy Roman] Empire."[20] In contradistinction to the territorial reconfiguration over the above estates, the Treaties of Westphalia also established new state actors, shifting away from the dominant empire.

How did the reorganisation of political power in Continental Europe form the international system? In producing a knowledge – the dismantling of and a theoretical reworking of "sovereignty". The basic principle of sovereignty was then revised to mean the equality of states. There is a double movement, then, of limiting the power of the Church represented by the Holy Roman Emperor over its dominions, on the one hand, and of transferring the instruments of sovereignty – that is the enaction of laws, regulations, command over armies, and so on – to princes. It is at the intersection of these two tendencies that the problem comes to pose itself: how sovereign is Westphalian sovereignty?

§2.3 The Westphalian Problem

Two problems appear apparent. First, within academic literature we easily encounter resolute statements such as "restrictions in sovereign rights were reorganised as a consequence of,

[19] Sheehan, Michael. 1996. The Balance of Power: History and Theory. London: Routledge. p. 38.

[20] Treaty of Osnabruck. ([1648] 1969). In The Consolidated Treaty Series, Vol. 1, edited by Clive Parry. Dobbs Ferry, NY: Oceana Publications.

inter alia, the Westphalian peace Treaties"[21], or yet, "[t]he basic rule of Westphalian/Vattelian sovereignty is: do not intervene in the internal affairs of other states."[22] If, however, the expression of being "sovereign" appears rather recent, that is to say post-Westphalia as the generalised opinion, the word "sovereign" as an adjective or substantive has, indeed, inhabited the linguistic domain longer than most would have accepted.

Second, for contemporarily, every state is part of an international college, the claim for absolutism of "sovereignty" is incompatible within the premise of present-day international society. Virtually every state is accorded sovereign equality, epitomised in the dictum of "*par in parem non habet imperium*" (or equals having no jurisdiction over each other). As far as scholars are able to establish, the inception of this dictum as one composite expression appears rooted in a canonical edict of Pope Innocent III.[23] This decree, subsequently enshrined in the Decretals of Greogry IX, forms an integral part of the Corpus Juris Canonica, which stood as the principal font of ecclesiastical legislation from the medieval period until supplanted by the Codex Juris Canonica in 1917. In this proclamation, Innocent III established that a Pope is prohibited from impinging upon the prerogatives of his successors in the exercise of their respective powers. The authority vested in the predecessor is no more extensive than that of those who succeed. While the initial use of the axiom pertained to inter-Papal dynamics concerning canonical authority, it eventually morphed into a juridical concept devoid of religious connotations .

§2.4 A Working Theory of Sovereignty

Most contemporary treatments of sovereignty – that is, Westphalian sovereignty – culminate in the articulation of Jean Bodin, in whose political philosophy was chief to syncretise the state with a sovereign character. By his account, sovereignty is "the most high, absolute, and perpetual power over the citizens and subjects in a Commonwealth."[24] A new finality emerges with the definition provided by Jean Bodin. To be sovereign is to be free from external influence, or in other words, sovereignty implies a hierarchical relationship between the sovereign and subordinates.

Structural hierarchisation has historically shaped international relations, from ancient empires to the colonial enterprises. While I can contend that post-Westphalia has seen an extension of

[21] Schmitt, Michael N. (ed.), International Law Across the Spectrum of Conflict. Essays in Honour of Professor L. C. Green on the Occasion of His Eightieth Birthday , International Law Studies, Vol. 75, Naval War College, Newport, R.I., 2000, 607 pages

[22] Stephen D. Krasner, The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law, 25 MICH. J. INT'L L. 1075 (2004)

[23] See Dinstein, Y. (1966). Par in Parem non Habet Imperium. Israel Law Review, 1(3), 407-420. doi:10.1017/S0021223700013893.

[24] Jean Bodin, The Six Bookes of a Commonweal (Cambridge: Harvard University Press, 1962), I, 8, 84

sovereignty to represent a sine qua non for relations between states, at least in rhetoric lip service, to concede that the hierarchy between states has become obsolete impedes any attempts at re-examining the concept of international legal sovereignty. Could the persistent assumption of an anarchic international system have hindered the recognition of hierarchy as a conceptual possibility? While I do not seek to answer this question, it does provide a backdrop to the following case study and could set the stage for further scholarly inquiry.

§2.5 The Tributary System of Ancient China – A Sinitic Sovereign

As I return to the absolutist view of sovereignty, we will take the tributary system of the Ming and Qing Dynasties which appeared to concretise sovereignty as hierarchy. Without entering into too much details, let me preface by forewarning my readers that the emergence of the tributary system as a conceptual category is an invented product of a late Victorian era imagination, lest we succumb to fetishising the orientalist reverie.[25] It is appropriate to begin with John King Fairbank's preliminary framework, for his pioneer study on the Chinese tribute system has influenced a generation of scholars and continues to serve as a basic reference point for a discussion of the Sinosphere. Fairbank and Teng describes the tributary system as "the mechanism by which barbarous non-Chinese regions were given their place in the all-embracing Chinese political, and therefore ethical, scheme of things" (1941, p. 139).

The tributary system constituted a cohesive set of practices that structured relations between China and the peripheral states up until the end of the nineteenth century. Underlying this Sinocentric order was the acceptance of Chinese cultural pre-eminence, wherein vassal states such as the Ryukyu Kingdom, Vietnam, and notably Chosôn Korea amongst others positioned themselves in concentric circles around China, reinforcing China's identity as the Middle Kingdom, and in essence, the Emperor as the "Son of Heaven." In the context of Confucian vocabulary, the system was in large measure an extension of the hierarchical socio-political order. Some examples will be helpful in interpreting sovereignty as hierarchy.

First, the subordinate status of Chosôn Korea is apparent in imperial documents, and its formal adoption of the Chinese imperial calendar illustrated Chinese hegemony in the Sinosphere. In appointing Yeongjo of Joseon as king of Chosôn in 1725, the Yongzheng emperor emphasised in a decree that he "shall serve as the fence on the eastern land, devoutly use the imperial calendar, pacify the land, and assist the imperial house forever". Likewise, Ming China's involvement in the Imjin War institutionalised its hegemonical position. The

[25] Van Lieu, J. (2017). The Tributary System and the Persistence of Late Victorian Knowledge. Harvard Journal of Asiatic Studies, 77(1), 73–92.

Emperor was quoted: “The imperial court will not let losses get in the way and we won’t rest until the bandits are extirpated and our vassal state is at peace.”[26] (Swope, 2009, p. 297).

§2.6 A Sinitic Sovereign

Opponents of the classical view of sovereignty primarily argue that the lack of a generative principle alongside states’ reluctance to cede their juridical sovereignty would invalidate any conceptual possibilities of hierarchy as sovereignty. However, common to nearly all analyst of international politics is the idea of neoimperialism, in which an implicit reimposition of colonial rule is enacted. Indeed, the linguistic hegemony within political activity is obvious.

This reflection of hierarchy as sovereignty attempts to argue that a revival of the classical notion of sovereignty is indeed, harmonisable with the Sinosphere. As previously illustrated, the central concept is that sovereignty necessitates a unified political structure culminating in the “sovereign” figure. A further compelling example is found in the ancient Chinese doctrine referred to as the “Son of Heaven.” According to this doctrine, the Emperor, is imbued with the “Mandate of Heaven” – that is, supreme authority – and is considered the ruler of “All Under Heaven.” This elevated status signifies not only a divine mandate to govern and maintain order within the realm, but serves as a poignant illustration of how an investigation into the Eurologocentric dimension of truth can offer alternative possibilities.

[26] Swope, K. M. (2019). Dragon's Head, Serpent's Tail: A Combat Unit Commander in Vietnam. University of Oklahoma Press., p. 297

Chapter Three

The Evolving Universal Public Policy

When we try to understand a text, we do not place ourselves in the author's inner state; rather, if one wants to speak of 'placing oneself,' we place ourselves in his [or her] point of view. But this means nothing else than that we try to let stand the claim to correctness of what the other person says. We will even, if we want to understand, attempt to strengthen his [or her] arguments.

Gadamer, On the Circle of Understanding

§3.1 The Foundations of Jus Cogens

Protests against a state-oriented science of international law proliferated during the first half of the twentieth century, chiefly among international jurists and courts, representatives of states and legislators of assemblies, in popular petitions and among scholars of international law. One observes a considerable departure from the excesses of unbridled state sovereignty and, instead, a gradual evolution towards a value-oriented international law founded upon moral principles. Indeed, no other subject matter is so often referred to in the United Nations Charter as the promotion and protection of fundamental human rights and freedoms. Article 55 establishes as a purpose of the United Nations the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion," while Article 56 imposes an obligation upon its Members to "take joint or separate action in cooperation with the Organisation" in furtherance of the previous provision.

The transition from the dominant theory of voluntarism in which rules of the legal body had to align with the general consensus of the international community to erga omens – that is, obligations owed toward all – characterised by a legal indivisibility, emerged at the conclusion of the Second World War. In that historical juncture, the Allied Powers stood poised to dispense a modest measure of idealism, a luxury made fleeting by their decisive triumph over the primary belligerents. The envisioned new order necessitated a departure from the traditional power-centric foundation. The United States was led by President Franklin D. Roosevelt, an outspoken foe of European colonialism and an advocate for domestic liberalism. The United Kingdom, governed by a socialist government, was duty-bound to fulfil its electoral promises amongst other commitments. The Soviet Union, having weathered profound wartime tribulations and being the progenitor of a socialist revolution, naturally adhered to its commitment towards proletarian internationalism. While latent seeds of conflict among these powers existed, overt discord had yet to manifest. Consequently, if not in earnest, as a strategic ideological veneer, these nations found it imperative to live up to their war rhetoric by providing assurances that the international community would never again countenance the scourge of war.

Homage is paid to the reformers – James Brierly, Hersch Lauterpacht, Gerald Fitzmaurice, Humphrey Waldock – for having introduced the notion of international public policy. Yet this reform must be situated within a spatial context: a growing international consciousness of the effects of absolute statism that had preciously defined the international system or, to be more precise, the impetus for an international social contract, as noted by one member of the International Law Commission during the drafting of the Vienna Convention: "There was not necessarily a surrender of national sovereignty, but membership of a community required the respect of certain rules. If that were not so, society would remain in the condition of savagery described by the phrase homo hominy lupus, which had lasted until the First World War and had prevailed almost unchallenged in the inter-war period. By becoming members of the international society, States recognised the existence of a minimum international order, which was none other than jus cogens. The abstract notions of absolute freedom and absolute sovereignty were not compatible with the existence of international society."[27]

Yet, beneath the humanisation of modern international law, the authoritative incorporation of morality as non-derogable norms of general international law functions, in fact, to relegate recalcitrant states to the role of "aggressors". Was this a general evolution in attitude of the imperialists? Perhaps, but more immediately, it demonstrated a nebulous spectrum of international authority in which a select group of rules were endowed with quasi-constitutional status at the expense of others.

This section takes its lead from Article 53 of the Vienna Convention on the Law of Treaties, a provision that purports to invalidate any treaty that contradicts peremptory norms of international law, which writes: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law…. [A] peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only be a subsequent norm of general international law having the same character." Article 64 operates alongside Article 53, which provides that the emergence of a new peremptory norm of general international law will render void any existing treaty in conflict with the norm. I caution that this section aims not at inspecting treaties as the aforementioned provisions were commissioned for, but instead an attempt at demonstrating that jus cogens is a covert vehicle for legal imperialism, and hence, presents a complex challenge in reconciling with the Sinosphere.

§3.2 The "Naturalness" of Jus Cogens

[27] [1966] I(1) YbILC 39, para. 40 (828th Meeting, statement by Mr Bartoš).

Because the formal delineation of what a peremptory norm is in Article 53 of the Vienna Convention is nothing more than a cursory and circular means of identification which falls short of any meaningful definition, I shall consider Alfred Verdross' work and continued reliance upon Verdrossian jus cogens by the four Special Rapporteurs on the Law of Treaties.[28]

In Verfassung der Völkerrechtsgemeinschaft, Verdross can be seen to reflect a genesis similar to that of a social contractarian. As an international constitutionalist, he highlights that "international law is not a mere collection of individual fragments which have no inner connection", but forms "a harmonious order of norms", which is "properly called the international legal community".[29] Verdross' conceptualisation of the international legal sphere as a community demonstrates a critical engagement with the epistemological foundations and theoretical oeuvre of the dominant political Catholicism of the 1930s. Verdross' partisanship for natural law is especially conspicuous when he writes that the "Christian doctrine of all men as children of God" represents the "ethical-metaphysical foundation" for the realisation of a universal legal order.[30]

§3.3 A Contested Moral Concept

Indeed, the genesis of jus cogens was influenced by natural law doctrines. However, it was less a radical innovation than an organic extension of the longstanding influence of natural law traditions. When contrasting Article 53 of the Vienna Convention which provides that norms can be modified by subsequence against the ever-evolving systemic perlocutionary transformations, one notices a conspicuous display of the abstract universalism. Within the apparent reductionism of the jus cogens provision made it possible for even the most vulgar imperialism and egregious conduct to clothe itself in legal garb. The old system of systematic racial discrimination, the use of torture, the exercise of powers attached to the rights of ownership over a human person, and particularly of concern to this section, genocide, had similarly drawn its ancestry from the divisions of Judeo-Christian doctrines. The heterogeneity of the ecclesiastical document constituted a transgression, for it manufactured a climate of unquestionable certainty to impose punishment.

There can be no question here of a biblical substantiation of colonial settler genocide. One would have difficulty finding a better illustration of the connivance among colonial authorities and missionaries than in the poster child for successful decolonisation, French

[28] S. Kadelbach, Zwingendes Völkerrecht (Duncker & Humblot 1992), 36-46; L. Hannikainen, Peremptory Norms (Jus Cogens) in International Law. Historical Development, Criteria, Present Status (Lakimiesliiton Kustannus 1988), 145-180.

[29] Verfassung der Völkerrechtsgemeinschaft (1926), Preface

[30] A. Verdross, 'Die sittlichen Grundlagen des modernen Völkerrechts' (1930/1931), in H. Klecatsky, R. Marcic and H. Schambeck (eds), Die Wiener rechtstheoretische Schule. Ausgewählte Schriften von Hans Kelsen, Adolf Julius Merkl und Alfred Verdross (1968), 2121, at 2121-2122.

Algeria. From the onset of the French invasion in 1830 until the conclusion of the Algerian War of Independence in 1962, Christian rhetoric was used to justify *la mission civilisatrice* and mobilise a system of political and social change organised around the metropole. Charles Lavigerie, Archbishop of *Algérie Française*, imagined a restoration of an Augustinian Algeria: "Algeria is the door opened by Providence on a barbaric continent of two hundred million souls. It is especially there that we must bring the Catholic apostolate."[31]

What appeared to be depicted in the language of the crusades, the humanising project of *Algérie Française* penetrated into even the smallest details of Algerian lives. This was done in three ways, which emerge clearly after elucidation:

1. Tracing its ancestry to the French Revolution of 1789, the policy of évolués, or coloured Frenchman, seized *Algérie Française's* youngest citizens from its infancy and funnelled them into a new education system, hence assimilating them into a division of mulatto freedmen. Anthropologist Peter Worsley reveals the racist assumption of this policy and its consequences for the French colonial territories: "This policy reposed, as the word évolué indicates, on the simple evolutionist-racist assumption that the indigenous cultures were primitive and backward, and that progress consisted in becoming more and more like the white man, whose culture was the pinnacle of human evolution."[32]

2. Religious affiliation hierarchised individuals in relation to the metropole. The Convention of July 5, 1830, was signed between Charles X's Minister of War General Louis de Bourmont and Dey of Algeria Hussein bin al-Hassan: "the exercise of the Mohammedan religion will remain free; there will be no attacks on the liberty of all classes of inhabitants, their religion, their property, their commerce, their industry."[33] In reality, however, a design of institutions crippled the Muslims of *Algérie Française*. The *Code de l'indigénat* of 1881 was a legal work on "native statutes" which codified twenty-seven provisions, one of which stipulating that Muslims required the permission of French authorities to go on pilgrimage. Edifices of the Mohammedan religion, such as mosques and shrines were frequently requisitioned and subsequently demolished or converted into French establishments.[34] The *Sénatus-consulte* of 1865 defined the Muslim *indigène* not as a French Citizen, but as a subject of the French colonial empire, unless they renounced their rights and duties under Muslim law and of their local civil status.

3. Disguised as an emancipatory initiative to liberalise both the indigenous from the smear of slavery and to make extinct of French pauperism, settlement was promoted as veritable

[31] Xavier de Montclos. Lavigerie, le Saint-Siège et l'Église, de l'avènement de Pie IX à l'avènement de Léon XIII, 1846-1878 (Paris, 1965), pp. 332 et seq

[32] Peter Worsley, "Revolutionary Theories," Monthly Review, XXI, 1, May 1969, 31.

[33] Evans, Martin, Algeria: France's Undeclared War (Oxford, Oxford University Press, 2012), 22

[34] Abi-Mershed, Osama W., Apostles of Modernity: Saint-Simonians and the Civilizing Mission in Algeria (Stanford, Stanford University Press, 2010), 62

colonisation. The impetus behind French settlement was stimulated less by economic rationales, particularly in comparison with other colonial powers such as Great Britain, but rather as an address to alleviate cities like Paris, Lyon, and Marseilles' surplus population. Artificially manufactured famines and epidemics reorganised the indigenous Algerian population and created the prospect of an exodus of impoverished French families.[35] The French government was, in fact, dumping its destitute, the explosion of the metropole's social ills, onto Algeria. Settlerism had one important implication. The growing presence of European settlers necessitated a more permanent ecclesiastical presence, that upon the the arrival of the first appointed bishop, Antoine-Adolphe Dupuch, the former vicar-general of Bordeaux, he swiftly reproduced the structure of a French diocese, complete with churches, Catholic schools, an orphanage, and an incursion of Catholic priests and nuns to address the integration of the *Pieds-Noirs*.

The modernisation of Algeria, a land perceived to be the antitheses of modernity, continues to present a challenge to statesmanship and conscience. As Patrick Wolfe characterised the primary object of settler colonialism as "elimination", notwithstanding the aforementioned violence – if taken to be understood without deplorable deafness to linguistic meaning – the demographic toll on the indigenous Algerian population itself qualifies for an assignation under the wings of genocide.[36] Article II of the Convention on the Prevention and Punishment of the Crime of Genocide provides a legal definition:

"In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

a. Killing members of the group;

b. Causing serious bodily or mental harm to members of the group;

c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

d. Imposing measures intended to prevent births within the group;

e. Forcibly transferring children of the group to another group."[37]

Today, France – to a certain degree at least – is a modest defender of the principle of self-determination and the human rights camp. Human rights are referenced in the French Constitution of 2008 as coming under the auspices of a Constitutional Council, and French

[35] P. M. E. Lorcin, Imperial Identities: Stereotyping, Prejudice and Race in Colonial Algeria (London: I. B. Tauris, 1995), 177-78.

[36] Patrick Wolfe, "Land, Labor, and Difference: Elementary Structures of Race," American Historical Review 106, no. 3 (2001): 867. See also Patrick Wolfe, Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event (London, 1999).

[37] Convention on the Prevention and Punishment of the Crime of Genocide

representatives constantly reaffirm the Preamble to the Constitution of 27 October 1946, which reads: " Faithful to its traditional mission, France desires to guide the peoples under its responsibility towards the freedom to administer themselves and to manage their own affairs democratically; eschewing all systems of colonisation founded upon arbitrary rule, it guarantees to all equal access to public office and the individual or collective exercise of the rights and freedoms proclaimed or confirmed herein." In a speech addressed to the 77th Session of the United Nations General Assembly after the Russian invasion of Ukraine, President Macron denounced the legitimacy of the war and refused to accept "a return to the age of imperialism and colonies."[38]

§3.4 Bettering the Heathens

The following, as documented in Avenir Colonial Belge on October 30, 1921, were the diktats by Jules Renkin, Minister of Colonies for the Belgian Congo, instructing Catholic missionaries to subsume the impoverishment of Africans, as he referred to, through deliberate misrepresentation and religious deceit: "Let us have the courage to confess that you have not come here to teach Africans what they already know…you will interpret the gospel in the way that best serves our interests in this part of the world…Your knowledge of the Scriptures easily will help you find passages which recommend and get people to love poverty."[39]

The license for settler genocide is often referenced to selective invocations of biblical passages. Numbers 33 is especially instructive in this regard as God tells Moses: "You shall take possession of the land and settle in it, for I have given you land to possess…But if you do not drive out the inhabitants of the land from before you, then those whom you let remain shall be as barbs in your eyes and thorns in your sides: they shall trouble you in the land where you are settling." For the French, as for as many other European powers at that time, the literary antecedent of the bible influenced a perception of international morality. Better the "heathens" for the God of Israel has made the colonists responsible.

Of course, the narrative of "improvement" through colonial acquisition disappeared shortly in the years after the inception of the Universal Declaration of Human Rights and the Special Committee for Decolonisation, but it was still by the ideological utility of the bible that governed the law of nations and regulate legal economies. In his manifesto to the Galatians, the apostle Paul reminds us that equality is endowed by the God of the New Testament: "There is neither Jew nor Greek, there is neither slave nor free, there is neither male nor female, for you are all one in Christ Jesus." The Genesis God also intended for all humans to

[38] Macron, E. (2022, September 20). Address to the 77th Session of the United Nations General Assembly [Speech]. United Nations Headquarters, New York, NY.

[39] "Les deviors des missionaires dans notre colonie," Avenir Colonial Belge (October 30, 1921), quoted in Ayedze (2009: 199).

be created as equals when it rehearsed that every human being is created as a "God-carrier". Inasmuch as positivists have sought secular underpinnings within the concept of human dignity, appearing to be remote from a theological foundation, the parallel is strikingly evident.

§3.5 A Sinitic Peremptoriness

If one compares the archives, a remarkable strategic coincidence emerges. Universalise the economy of international law and homogenise its application through a cosmological brandish. What I am arguing for is this: The reconfiguration of international conscience is nothing but a trojan horse for legal imperialism, a tool for ideological domination in the hands of the hegemons. By language of Article 53 of the Vienna Convention which asserts "as a whole" and later interpreted as "a very large majority" by the Chairman of the Drafting Committee, it offers personal power to states with the largest voting share to practice a constant legitimacy over clientelist states – so much so that in refusing peremptory norms was also deemed an attack to the international community.

Consequently, questions of universalism arise. Is a reconciliation of jus cogens with the Sinosphere possible? Is there a presence of a Sinitic attitude towards human rights independent from the so-called "universal" network of cogens? Is the international community heterogenous? To answer these questions, it is useful to consider the rejection about the possibility of a regional jus cogens. According to Humphrey Waldock, the ILC's fourth rapporteur on the law of treaties, "[i]t was for the community of States to recognise the peremptory character of a norm," and that an amendment of such "might give rise to technical difficulties."[40] He concluded that the conflict "approached the question from the wrong angle."[41] Indeed, the juxtaposition of the concepts of regionalism, in this case the Sinitic world, and peremptoriness may appear counter-intuitive. States, likewise, have mostly reflected a radical position to the possibility of regional jus cogens. For example, according to Greece the idea of regional jus cogens "runs contrary to the very notion of jus cogens, which was by definition universal."[42]

The recognition of such a concept, in States' perception, would be at the detriment of the integrity of the universal concept of jus cogens. While I contend that a remedial is warranted, it appears that a Sinitic peremptoriness is unlikely. Nonetheless, a taxonomy of clearly designated principles on what is considered peremptory would require authority to effect concrete change.

[40] UNCLOT I (n 10) 328

[41] Ibid.

[42] Ibid.

Chapter Four

Of Just War

In my final section, I will offer two reflections. I will present an already-inventoried inquiry, that is, the genealogy of moral thinking in war of early modern Europe and of ancient China . Following, I will demonstrate that the normative framework can be found to manifest a similar logic that which underlies the very systems of oppression, that is the dehumanising consequences of which it is ultimately trying to mitigate.

§4.1 Thucydidean Ethics

The first inquiry is historical: Of whom and where has the just war narrative originated from? Clearly elucidated in the preceding sections, there is a tendency in knowledge production of the social sciences to privilege a Western European ethnocentricity. While I may further appear to allude to Eurologocentricism at times, I am only doing so to demonstrate the historical construction of moral thought in war to locate other forms of subjectivity.

To commence, the background to the Mytilenean Debate is the following: In the fourth year of the Peloponnesian War, the oligarchs of Mytilene planned a rebellion against the Athenian empire in concert with Sparta in an attempt to forcibly unify the five island cities under their sovereign leadership. For their revolt was not met by the success they anticipated, further exacerbated by acute depletion of provisions and tensions from an armed demos, the Mytilenean government were compelled to surrender in fear that they would themselves be excluded from capitulation. The Athenians, furious that the Mytileneans were granted the privilege of non-tributary status and yet could venture over to the Peloponnesian enemies, decreed that the whole adult male population of Mytilene be put to death, and to make slaves of the women and children. Thucydides reconsiders the morning after the Athenians sent a trireme to communicate the decree: “The morrow brought repentance with it and reflection on the horrid cruelty of a decree, which condemned a whole city to the fate merited only by the guilty.”[43] The debate that Thucydides recounts between Kleon and Diodotos was, hence, a reconsideration of the justice of their decision.

§4.2 Classical Thinkers in Ancient China and Early Modern Europe

In both the moral headache that the Athenians woke up to and the orations by Kleon and Diodotos, we already find questions on levying war and to fight a war justly present in the minds of classical antiquity. Within the confines of a rigid chronological narrative, however,

[43] Thucydides, The Peloponnesian War (ed.), John H. Finley, Jr. (New York: The Modern Library, 1951). III, p. 36

one may inadvertently neglect the nuances and tensions beneath waging a just war, for a number of candidates present themselves for consideration. For instance, one might consider honouring Aristotle as the progenitor of the term "just war", although contemporary usage of the term has semantically departed.[44] More promisingly, Cicero's work in supplying the legislation of the Roman Republic markedly prefigures and is preserved by Augustine of Hippo (also widely referred to as Saint Augustine), while the epistemic implication of Thomas Aquinas' (also widely referred to as Saint Thomas Aquinas) Summa Theologica is the emergence of the just war tradition as we understand it today.[45]

We are then confronted with an abundance of material within the tradition. Presentation of any of these authors would be defensible to considerable extents for it reflects the particular trajectory one wishes to inspect. Considering that the starting point is always to some greater or lesser degree tendentious and subject to challenge, I will appraise Aquinas against Mencius and Hsün-tzu for two reasons. Firstly, the general strategy which Aquinas adopted has had a considerable emphasis on divine command ethics. In parallel, while it has been argued that Confucianism fails to present many of the characteristics which are rudimentarily found in the Judeo-Christian religion, Confucianism still exhibits discursive attitudes towards power regimes and hence, is in line with the operative meaning of "religion" of this paper. Unlike his followers, Confucius himself, did not reach the point of developing a theory of war in *The Analects*. Mencius' importance in the Confucian tradition conferred him the title "Second Sage", that is, second to Confucius himself, whereas the works of Hsün-tzu shares many of the cardinal Confucian virtues. Secondly, by Aquinas' allusion to the discussion of a just war in a specific *quaestio*, and Mencius' and Hsün-tzu's narration on deontological ethics, their contributions have influenced succeeding generations of thinkers and continues to serve as basic reference points for reconciling justice and necessity in war.

The first articulus of a just war from *Summa Theologiae* (also referred to as Summary of Theology) asks: "Whether it is always sinful to wage war?"[46] The word Aquinas employs here – that is, "always" – appears to present this question as a declarative sentence by way of structural linguistics. Similarly, at their time of writing, Mencius and Hsün-tzu exhorted doctrines of victory without bloodshed. Arguably, Hsün-tzu is most famously quoted for

[44] For Aristotle, men may wage war, first, to "provide against their own enslavement," second, to "obtain empire for the good of the governed, and not for the sake of exercising a general despotism," and third, to "seek to be masters only over those who deserve to be slaves." See https://historyofeconomicthought.mcmaster.ca/aristotle/Politics.pdf

[45] Nussbaum (1943, p.455); Hubrecht (1955, pp.163, 166–7); Russell (1975, p.16); Corey and Charles (2012, p.10). For further references to Augustine as the "father" of just war, see O'Driscoll (2015, p.1). Paul Ramsey, 'The Just War According to St Augustine', in Jean Bethke Elshtain, Just War Theory (Oxford, 1992), p. 8. Cicero, De Officiis, ed. M.T. Griffin and E.M. Atkins (Cambridge, 1991), 1:34-38. Ambrose, 'On the Duties of the Clergy', in Riechberg et al, Ethics of War, p. 69.

[46] Summa theologiae II-II, Q. 40

subjugating the enemy by minimal carnage in the first chapter of his seminal work, The Art of War: "Warfare is the way of deception."[47]

No emergence of any narrative is constructed in a vacuum, for they are complex political phenomena. I will not detail a devolution into the historical contexts, but the nature of these intuitions, which in particular, permits the above authors to create the impression that war must always be abhorred necessitates a brief introspection into the political discourses of which they were developed.

§3.3 War in ancient China and early modern Europe

It goes without saying that Aquinas' personal proximity to war left an unmistakable imprint on his writings. He was not only privy to the war between the two internationalisms of his time – the Catholic Church and the Holy Roman Empire – but also inherited physical kinship with the Emperor. Within this period, intense struggle between the feudal-expansionist House of Hohenstaufen and the Popes allowed for Aquinas to converge his views towards Pope Innocent IV, who challenged Frederick II's hegemonical ambitions.[48] In like manner, the then-present history of Confucianism had immense capability in influencing the emerging schools of thought as the eminent Zhou Dynasty (1027-256 BC) of China was declining.

During the Western Zhou era (1027-771 BC), a feudal system was institutionalised in which the Western Zhou king (or "Son of Heaven") enfeoffed fiefs to relatives who then assumed lordship of vassal states. This situation was profoundly changed when a "barbaric" attack killed King You of Zhou (795-771 BC), forcing the Zhou royal court to relocate from Hao to the eastern capital of Luoyang.[49] The patrimonial proto-bureaucracy intensified the existing political turmoil during the ensuing Spring and Autumn Period (770–481 BC). Territorial expansion between the various powerful *guo* eventually disintegrated the royal house, ushering in the onset of a new multi-state system.

Accordingly, a plurality of ethical visions emerged. The transition of which classical thinkers debated on legitimacy and the use of force represented the fine line dividing "antiquity" and

[47] Hsün-tzu 1990, 222–225; 15.1d

[48] James M. Powell. "Frederick II and the Church: A Revisionist View." The Catholic Historical Review 48, no. 4 (1963): 487–97.

[49] Note: I use the term "barbaric" in the same way that descendants of the Zhou lineage termed non-Zhou peoples.

"post-antiquity" in the intellectual conceptualisation of ancient China.[50] One can see why for two converging reasons.

First, as a consequence of the intensity of competing political considerations, the once feudal dukes, now self-declared kings, turned to philosopher-thinkers to prescribe ideas on managing state affairs. Indeed, scholars have critically argued that the precedents "were employed as a 'cover' by rulers to achieve their own aims, usually involving territorial aggression and expansion as well as internal tyranny."[51]

Second, that the period characterised by unceasing conflict produced an impetus for ethical propositions. As Hsu delineates, there were only 38 years of peace between 722-464 BC of the Spring and Autumn Period, and only 89 years of peace from 463-222 BC. This illustrates that warfare occurred 75 percent of the time during the five centuries of ancient China from 722 to 222 BC.[52] Despite the comparatively lower frequency of conflict during the Warring States period, they were often prolonged, of heightened intensities and of grander magnitude. The decrease in the number of states during this period, from 170 to seven due to conquests, further accentuates the tumultuous state of this following period. Hence, the contentions of the Hundred Schools of Thoughts appear to be a development of ethical articulations, which were inadequate both at the conceptual level and at the institutional level.

Already, we find a resemblance of the historical system in Europe and China. It must not be forgotten that, in Zhou China, the dissolution of the feudal hierarchy and the composition of sovereign territorial states closely mirror the anarchical international system we understand it to be contemporarily – that is, the fundamental assumption that implies the absence of an overarching authority.

§3.4 A Western and Eastern Just War Narrative

Returning to Aquinas' inquiry regarding the sinfulness of war, he writes of fifty-eight articles in the *Secunda-secundae* aimed at determining whether a particular act ought to be permissible. War, for Aquinas, is always sinful, unless three conditions are fulfilled. The first condition being the necessity of a "princely authority" to declare war is predicated upon two

[50] In advancing his theory of new historicism, the Warring States philosopher Han Fei (380-233 BC) divided the history of China into three eras: (1) remote antiquity; (2) the middle age; and (3) the present age: "Men of remote antiquity strove to be known as moral and virtuous; those of the middle age struggled to be known as wise and resourceful; and now men fight for the reputation of being vigorous and powerful." See The Complete Works of Han Fei Tzu, trans. W. K. Liao (London: Arthur Probsthain, 1959), II, p. 279

[51] Lo, P.-C., & Twiss, S. B. (2015). Chinese Just War Ethics: Origin, Development, and Dissent. Routledge. p. 95

[52] Hsu, C.-Y. 1965. Ancient China in transition: An analysis of social mobility, 722-222 B.C. Stanford, CA: Stanford University Press. pp. 56-64

grounds – that is, "no higher redress" and temporal superiority.[53] He writes of the first argument: "the authority of the sovereign by whose command the war is to be waged. For it is not the business of a private individual to declare war, because he can seek for redress of his rights from the tribunal of his superior."[54] This juridical principle is anchored in the notion that resorting to war for the purpose of attaining justice between two parties will be precluded, when, in principle, their dispute can be adjudicated by a higher authority possessing jurisdiction over both. Following this argument, he writes: "Moreover it is not the business of a private individual to summon together the people, which has to be done in wartime. And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them."[55] The conduct of war is explicitly entrusted to "princes", for the well-being of the citizens is the essential objective of public authorities.

Following the historical antecedent of the Western Zhou period, a natural attempt at reconciling the cardinal Confucian values of *ren* (henceforth referred to as "humanity") and *yi* (henceforth referred to as "morality") with the use of force naturally followed. War, for Mencius and Hsün-tzu is, prima facie, not an optimal resolution unless to rectify aggression and tyranny. It is obvious that the two authors align closely with Aquinas in arguing that the rightful authority to declare a war belonged to the True King who had received the Heavenly mandate. In Mencius, we find parallels to Aquinas' "no higher redress" decree, which he writes: "A punitive expedition is a war waged by one in authority against his subordinates."[56] Sun-tzu concurs with Mencius: "In the rule of the True King there are punitive expeditions but no [aggressive] warfare…When the ruler and his subjects are pleased with each other, congratulations are offered…Thus those who live in anarchy rejoice in his government and those discontent with their own ruler [living under tyranny] desire that he should come."[57] Here, Sun-tzu develops the authority decree further by introducing the ambivalent role of "lord-protectors", whom are rulers though not mandated by Heaven, are second to the True King and "offers survival to those who face destruction…he guards the weak and forbids aggressive behaviour"[58]. Hence, they may likewise undertake punitive military action.

The second condition of Aquinas is, that in order for a war to be just "a *causa justa* is required, so that those who are attacked deserve this attack by reason of some fault (*culpam*)."[59] Immediately, Aquinas cites Augustine who noted that: "A just war is wont to be described as one that avenges wrongs, when a nation or state has to be punished, for refusing

[53] ST II–II, q. 40. a.1; q. 41, a.1, ad 3

[54] Ibid.

[55] Ibid.

[56] Mencius, 2003, 157; 7B2.

[57] Hsün-tzu, 1990, 227, 15. 1f

[58] Ibid., 99–100; 9.8

[59] ST II–II, q. 40, a. 1; in (Reichberg, Syse, and Begby, 2006, chap. 16, p.177).

to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly."[60] Ancient Chinese ideas about vengeance did not differ considerably from Aquinas' and Augustine's conceptions. In indicating the distinction between the guilty and the innocent, Sun-tzu wrote: "As a general principle, in punitive expeditions, punishment is not extended to the [populace], but rather only to those who have caused anarchy among them."[61]

There is, finally, a third condition which is conceived naturally from writing of morality in war – "intend the advancement of good, or the avoidance of evil."[62] While Aquinas does not frame a conceptualisation as he did for the first two conditions, it is nevertheless utilitarian, for he writes: "For it may happen that the war is declared by the legitimate authority, and for a just cause, and yet be rendered unlawful through a wicked intention." Mencius and Sun-tzu reconcile their articulations of a just cause to a Confucian normative ideal of instantiating the peace and order of *Tianxia*. In criticising King Quan of Qi on the annexation of Yan, Mencius said: " Now when you went to punish Yan which practiced tyranny over its people, the people thought you were going to rescue them from water and fire, and they came to meet your army, bringing baskets of rice and bottles of drink. How can it be right for you to kill the old and bind the young, destroy the ancestral temples and appropriate the valuable vessels?"[63] In concluding, he asked for the King to release the captives and establish a new ruler in consultation with the people of Yan. Sun-tzu concurs: "A man of humane principles will organize his state in order to proclaim ritual and moral principles to all and will allow nothing to impair them. He will not perform even a single act that is unjust or that would result in the execution of even one blameless man, although he might gain the empire by doing so."[64]

§3.4 The Dehumanising Aspect of a Just War

But what does it mean to wage a just war, or to possess the power to wage a just war? A textual analysis of the liberal expressions within both Western and Eastern just war thoughts reveals a portrayal of a Manichean world, a struggle between the good protagonists against the evil antagonists. In the act of ameliorating the suffering of the oppressed, it reinforces the foundation of the liberator's position of privilege, which is indispensable for assuming the role as a liberator.

The Manichean mode of rhetoric was cited in the introduction of this paper, in which Vitoria rendered the "Saracens" incapable of waging war. Indeed, the binary oppositions established through this manner of conceptualising a just war further entrenches an architectonic that

[60] Ibid.

[61] Hsün-tzu 1990, 227; 15.1f

[62] Decretum, book II, causa 23, q. 1 In (Reichberg, Syse, and Begby, 2006, chap. 10, p.112).

[63] Mencius 2003, 25–26; 1B11

[64] Hsün-tzu 1990, 150; 11.1a

dehumanises the subjects of domination. The conception of a just war cannot function effectively without a spatial partitioning between the liberators and the oppressed.

Such is the normative concept of the just war. Inasmuch as the liberal humanitarian system of the West and East advance their morality, albeit in varying degrees, they too advance a type of structural violence and are systematically reproduced. That is not to deny the utility of the framework. The point is to acknowledge the privileged perspective, and correspondingly, attempt to enact a reversal. True liberation from oppression can only emerge from counter narratives voiced from the standpoint of the oppressed.

Chapter Five

Conclusion: A Reappraisal of Modern International Law

This dissertation has revealed the manner in which the linguistic mean of texts within the international legal body exercises its power. Through a thorough interrogation, I have revealed the ideological assumptions underpinning its production – that is, Christianity and Eurologocentrism. Thus, with regard to the central purpose of this paper, we now have a clear answer as to how this has been institutionalised.

However, could this paper also be susceptible to the same rhetorical orientation that privileges a Eurologocentric attitude? Syed Hussein Alatas, in developing the concept of the "captive mind," argued that in being a product of the Western colonial order, the perspective of non-Western minds are imbued with the subjugators. He defines the captive mind as "an uncritical and imitative mind dominated by an external source, whose thinking is deflected from an independent perspective."[65] Nevertheless, I maintain that this admission does not render invalid the critique I put forth. Rather, by way of a conclusion, I attempt to offer new interpretive insights to transcend the limitations that have restricted the tradition because of the myopic historiographical assumptions.

§5.1 Policy Recommendations

First, I ask the question of whether it has become impolite to speak of hierarchy in contemporary international relations? Perhaps so, but in acceding to the primordial assumption that the international system is inhabited by a system of Westphalian-sovereign states and hence anarchical, denies any possibility at presenting alternatives of international legal policies concerned with the status of different polities. To the extent that states, especially the smaller and less powerful ones, find the norm of Westphalian-sovereign attractive for a multiplicity of reasons, one of which granting them the power to conceal objectionable behaviour from other states, revealing the dead horse can also curtail and restrain imperial endeavours by more powerful states. Further, constructing hierarchy as the protectorate of sovereignty could contribute to the management of Westphalian-sovereignty far more efficiently than current political realities. A shift from a feature of horizontal authority to a vertical authority could be a possibility in removing states from the ostensible anarchical international system, as Hobbes would have predicted.

[65] Alatas, 1974: 692

Second, in deliberately dispensing the determination of the substance of peremptory norms, the network of jus cogens continue to stand in a determining-determined relationship. While in concluding Chapter Three we had seen a rejection of a regional jus cogens, it is nonetheless useful to take the model of the Inter-American Court of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms into consideration. By existence of these institutions, it demonstrates that there is, indeed demand from regional bodies to practice regional peremptoriness. The IACHR, for example, has recognised eight jus cogens norms exclusive from the catalogue that the ILC has listen non-exhaustively.[66] I shall not analyse here all the recognitions by the IACHR, but a cursory glance of its jus cogens principle of non-return, or "non-refoulement", as referenced, "including non-rejection at borders and indirect refoulement" and its relationship with human mobility within OAS Member States does reflect regional aspirations.[67]

Finally, an examination of the Western and Eastern just war narrative would unravel two commonalities between the records. First, in that the dominant narratives determine the nature of the privileged and oppressed, and second, that early modern Europe and ancient China shared many political processes. If we are truly concerned about decolonising the international legal body and its rules, perhaps it is now opportune that we develop the potential of constructing an international body of law while considering the evolutionary histories of other civilisations. Consequently, resulting in a truer form of universalism.

In this dissertation, we have already embarked on the first step – to be aware of the Eurologocentric dominating paradigm. This enables us to conduct research in a value-free manner and reconstruct the questions that we ask. Overall, in highlighting the contingency of both the Western and Eastern trajectories, we remove the barriers that exercise power over theories.

[66] See Denunciation of the American Convention on Human Rights and the Charter of the Organization of American States and the consequences for State human rights obligations, IACtHR Advisory Opinion OC26/20 of 9 November 2020, Series A No. 26 [OC-26/20], para. 106.

[67] ibid.

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