

States of Exclusion: A Critical Systems Theory Reading of International Law

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1 Background

This study attempts to look at how international law has historically functioned in its co-constitutive relationship with the social systems of politics and science. Starting from the assumption that international law is an autopoietic social system, it is argued and demonstrated that through the interaction with its environment, international legal norms were shaped by the discourses in the political and science systems, and vice versa. An attempt is made to show that this has been the case since the very first complex societies, and that international law is therefore structurally skewed by power and knowledge. Although the cases discussed are mostly historical ones at the dawn of modernity, the conclusion is reached that international lawyers and scholars need to be conscientious of remaining structural asymmetries still left within the legal system.

2 Research Aims

The central research question of this study is to investigate to which extent states, through international law, gave expression to both the political and scientific discourses (understood to be systemic communication media) of their time during the era of colonialization.

In order to answer this question, each chapter attempts to develop the argument by sequentially dealing with and answering one question at a time respectively, which are as follows:

- a. As a matter of methodology, how can we make the international law system comparable with other (very different) social systems and processes? Given the comparison of significantly different social phenomena, a sufficiently abstract theory is required. Autopoietic systems theory is presented. However, it is also modified and updated to adequately address the central research question.
- b. It is taken that states are, as the primary subject of international law and colonial power, the principle actor where the different systems mentioned in (a) converge. However, the modern state cannot be taken as is, but must be understood as the outcome of a contingent historical process. Thus, the question becomes, how can we understand the underlying structures of the state historically, that allowed for the close interlinking of law, politics and science?
- c. The nation-state is the only political form today. How is this expressed legally in the doctrine of sovereignty, and how did this doctrine allow for the nation-state to become the universal model of political rule around the world?
- d. By looking at a specific case, the Berlin Conference of 1884, we will attempt to answer the question of how did political power influenced legal doctrine in order to create order and legitimacy over colonial territories?
- e. Finally, the question is asked: to what extent does international law express and is it legitimised through the scientific discourse of the day? Using the cartographic map as a second case study, we hope to show how scientific truth can inspire the legal imagination, but that it also contributes to the maintaining of existing power structures.

3 Methodology

The scope of the research aims is clearly very broad and belongs to the sphere of macro-analysis. Therefore, only a grand social theory can suffice. This is done even though such approaches are considered today as rather old-fashioned, in favour of more empirical research. However, in a work that attempts to investigate the logic of different social systems, it would be a mistake to remain trapped within a single disciplinary approach. As Feyerabend argued, knowledge is not gained through careful refinement of existing theories, but by pitting incompatible theories and approaches against each other.¹ Thus, despite the eclectic approach taken in this study, it can be unified under perhaps the last attempt at grand theory in the social sciences, namely the autopoietic systems theory of Niklas Luhmann.

The methodological approach of this study follows a classical textual or literature review. The principal source will be the primary sources of Luhmann's published work, complemented by unpublished pieces from his literary estate. Further sources are primary texts by other theorists. For the analysis of specific legal problems, instruments and case law is taken as the final primary text. It is only then attention is turned to commentaries and opinions contained in secondary sources to enrich the primary sources, namely Luhmann's theory and positive public international law.

The study is draws from various disciplines, whether it be public international law; legal philosophy or theory; history (legal and otherwise); sociology; politics and even geography. This makes the methodology inter- or transdisciplinary. The reasoning is inspired by the mode of "world disclosure" as described by Martin Heidegger,² claiming that the meaning of something is disclosed by the ontological context or backdrop within which it is situated. This is how the object of investigation in this study has

¹ Feyerabend, Paul. *Against Method*. London & New York: Verso, 2010. 14.

² Heidegger, Martin. *Being and Time*. Trans. Joan Stambaugh. Albany: State University of New York Press, 2010.

been found: international law which is informed by and only makes sense within the context of politics and science; which assumes the backdrop of nations. There are thus ontological layers upon layers without which the law cannot operate. However, the normative component of the study is inspired by second-order or reflective world disclosure as proposed by Kompridis.³ This means that the structure or intelligibility of the ontological givens are questioned, allowing us to question the validity or assumptions of our institutions. This means that this study will concern itself with very fundamental, even basic, background assumptions of international law. The point is that by re-educating ourselves about the background, the legal object of our study can be cast in a new light. It is thus needed to pull out the foundation from under law, to destabilise it, so we can reorient it in a new direction.

Another inspiration comes from the methodological anarchism of Paul Feyerabend. In his classic work he convincingly argues that not only are theories derived from facts, but that certain facts emerge to dominance in light of theories.⁴ This should especially hold for the social sciences, and in fact international law clearly reflects this. He argues that scientific inquiry starts when expectations have been disappointed.⁵ Therefore the boundary between the descriptive and the prescriptive is never that clear.⁶ Although Feyerabend is self-admittedly prone to controversial overstatement, he is successful in making us question traditional methodology. If international

3 Kompridis, Nikolas. *Critique and Disclosure: Critical Theory between Past and Future*. Cambridge: MIT Press, 2006. The point of second-order or reflective disclosure appears to be a relative of second-order observations in Luhmann's theory. This is essential for subsequent ideas in this study, and a thorough treatment of the topic by Luhmann is dealt with in the second chapter.

4 "It is the historico-physiological character of the evidence, the fact that it does not merely describe some objective state of affairs but also expresses subjective, mythical and long-forgotten views concerning the state of affairs, that forces us to take a fresh look at methodology." Feyerabend (n 1) 47. Emphasis in original.

5 For a similar argument in the field of political philosophy, see the opening paragraph of Critchley, Simon. *Infinitely Demanding: Ethics of Commitment, Politics of Resistance*. London & New York: Verso, 2012. 1.

6 Feyerabend (n 1) 151-154.

law and states have contributed to the problems we face today (as this work argues), “why should we even consider the ‘facts’ that gave rise to problems of this kind...”?⁷ Of course, this is meant to be controversial. Nonetheless, it is the aim of this study to present an alternative narrative, one that is nevertheless as conscientious as possible to historical fact, while being open to inspection and criticism.

In the way that materiality, be it in the form of resources or scientific instruments such as maps, is investigated as an influence on the international legal system, methodological inspiration is drawn from actor-network theory, especially as proposed by Bruno Latour.⁸ This seems at first as a rather improbable choice. A young Latour was a vocal critic of Luhmann, particularly since the former insists on the agency of the material world in contrast with the (apparent) inattention the latter pays to it.⁹ This advantage of Latour’s approach means that the typical relations, hierarchies and causalities surrounding international law are flattened out and retraced. Groupings are nothing more than certain distinctions being made, or boundaries drawn by someone around something. Another useful element of this method is that agency belongs not only to human actors or groups, but that it extends to the material world too. Agency becomes not a characteristic of human cognition but a kind of movement or relation between entities that changes their relationship or action. This reflects a current shift towards what has been described as object-oriented ontologies.¹⁰ The methodological point of departure is thus that anything that changes social relations is relevant.

⁷ Feyerabend (n 1) 158.

⁸ Latour, Bruno. *Reassembling the Social*. Oxford: Oxford University Press, 2007.

⁹ A particularly exciting showdown between them occurred in Bielefeld during the joint conference of the *European Association for the Study of Science and Technology* and the *Society for Social Studies of Science* during October 1996. For a conference report that reads like something from the sports pages, see Wagner, Gerald. “Signaturen der Wissensgesellschaften - ein Konferenzbericht.” *Soziale Welt* 47 (1996): 480-484.

¹⁰ Harman, Graham. *Object-Oriented Ontology: a New Theory of Everything*. London: Pelican Books, 2018.

Thus, while I believe that some theoretical innovations are made, the value of this work lies perhaps most in its synthesis of various methods in order to make a broad argument, in a hope to appeal to positive lawyers to reconsider their discipline.

4 Chapter Overview

As per our research aims, the purpose of this study is to investigate how international law reflects political and scientific discourses during the age of colonisation, culminating in the Scramble for Africa. The nation-state formed, as it continues to do today, the decision-structure in which these discourses and goals made sense. Thus, an important question would be, how did the state come to be? The state is naturally a juridical-political creation and it enjoys a central position in international law. However, the state is as much a product of international law as vice versa. More than that, the case is made that the discourses and communications stemming from the scientific system played an essential part in this evolution from the very beginning.

The second chapter attempts to give the theoretical framework that informs the entire study. Our research question poses the problem, of how we are able to speak meaningfully of very different systems like international law, politics and science at the same time. Autopoietic systems theory is selected as a suitable candidate, due to both its breadth and sophistication. However, given that this work relies upon Luhmann's writings and theory heavily, and it is not widely read within international law, no prior knowledge can be assumed. That is why in this chapter an overview of systems theoretical concepts is given. An effort is made to highlight only those theoretical tools which are directly relevant for the whole work. Taking a systems theory approach means that means a critical look at international law and its history is taken to see where traditional accounts fall short in terms of temporal scope, interdisciplinary insights, and looking

at the deeper social structures that drove legal processes. It requires of us to re-evaluate existing knowledge, including the source.

As we have stated, international law does not operate in a vacuum. It has always been partnered with the political power of the state, and the truth-claims of the sciences, and has always relied on the persuasive effects of these in order to substantiate its claims. This is also apparent in the creation of the nation-state. What the chapter attempts to show is that these two symbolic media have an inherently asymmetrical effect. Political power has allowed the communication of coercion to be paraded as consent. This has made the creation of states possible, as well as the expansion and homogenisation of this political form across the world, in large part due to international law. On the other hand, scientific truths (almost always under the control of the state) has allowed for new technologies that enabled states' expansion. I also argue that it lied at the bottom of the civilisation/barbarism argument, and justified intervention into foreign territories.

After the theoretical foundation is laid, attention is directed to an historical account of the rise of complex political society where law, politics and science come together in the state. It is important to understand the historical process that created the structural framework in which colonialism is made meaningful. Thus, in the third chapter the origins of the modern nation-state and sovereignty is traced. Rather than rooting it in the traditional modern sources, such as the Peace of Westphalia, it is argued that political power has assumed the same essential function for millennia, increasing only in sophistication but not essence. Unusual for a work of international law the origins of state sovereignty are traced to the first complex societies from the agricultural revolution. This invaluable detour tells us an incredible amount about states and sovereignty and is thus invaluable.

The third chapter begins with a meditation on the nature and dangers of historiography. Given that international legal history is becoming a rapidly expanding subdiscipline, it is important to reflect on what it means to write a history of international law, or even of sovereigns. In line with the theoretical tools of the prior chapter, the historical knowledge is shown to be deeply political *per se* and any legal history has ideological consequences. While no historiography can ever escape this, the least it can do is be self-aware of the fact. From there the chapter then progresses to trace the development of sovereignty. It is common sense that the rise of states was always accompanied by scientific progress, in the form of technologies of rule such as ships and guns. However, the point argued here is more subtle: that there also exist rhetorical or even invisible technologies, arguments that could persuade others to act according to the will of the state.

In light of this structural dependency the evolution of the state is studied in three phases: segmentary, stratified and functionally differentiated societies. In each phase sovereignty manifested in slightly different ways. This naturally had concrete effects on international law and how it was understood: who the subjects could be, how jurisdictions could overlap or not, or who had what rights over which territories. Further, each phase quickly reached a ceiling in its expansion due to technological constraints. The beginning of each new phase aligns with sudden scientific advances that allowed an explosion of energy to be harnessed by sovereigns. Thus, several things arise from viewing such a long history of sovereignty: it points not to surface changes in society but to underlying evolutive structures, how they remained nearly intact for millennia and were able to repeatedly establish their autopoiesis. This allows us to critically examine sovereignty today: that the leviathan is not a contract for protection, but that it has roots in exploitation, extraction and colonialism. International law too had to adapt in each case too and shifts in the balance of power quickly became reflected in the rise and fall of doctrines such as sovereignty.

The fourth chapter arrives at the present day in order to investigate how sovereignty can be understood today, given the theory and history that was discussed before. In this chapter international law also steps to the fore in full, as it has its own sophisticated doctrine of sovereignty. It is also asked how the sovereign nation-state has become the universal political and legal model today. This occurred through tight legal definitions of sovereignty, which despite appearances was still rooted in the ideas of civilisation, that allowed only certain types of polities to be accepted. In part this happened through the dual wielding of power and truth by strong states. Often international law reflected this in a balancing act. What this chapter argues is that inter-systemic communication is prone to breaking down, and paralyses action rather than enabling it, making it difficult to address pressing global problems. In this light it is proposed that legal sovereignty has become a barrier to cooperation.

Sovereignty itself is held as a kind of social technology that has instrumentally or tactically been applied in different ways. Through a reading of Carl Schmitt, it is argued that sovereignty implies not merely an antagonistic relationship but necessarily also an asymmetrical one. This makes the term "international cooperation" oxymoronic. One of the causes for this problem is that the nation-state is already, according to Luhmann, an anachronistic concept in a functionally differentiated world society. Due to political and scientific structures, international law is stuck in a methodological nationalism, meaning that it is unable to resolve global crises. The next chapter attempts to prove this through case studies.

The fifth chapter takes a historical event of international law under closer scrutiny, namely the Berlin Conference of 1884-85. In this famous meeting colonial powers gathered for the division of the African landmass into imperial possessions. The chapter looks at how systems theory can describe how the political system not only influenced international law but relied on the law to legitimise its projects. The Berlin Conference shows how nation-

states are fuelled towards ever-greater expansion; that they are constantly forced into competition rather than cooperation; and that the creation and application of legal norms were very much modulated through a rhetoric of power and truth.

States were unquestionably driven by the desire for more power. Even those states that were not expressly interested in that, did it so as not to be left behind. Due to a modernistic scientific approach, a teleological understanding of history prevailed, and it was easy to use their development as a justification for colonialism as a humanitarian, civilising project. This presented the challenge to international law, of how to create internally consistent norms that could satisfy the persuasive communications that came from both politics and science. The first was a redeployment of the mentioned civilisation/barbarian distinction. The other legal technology that was employed much more crudely was border regimes. The long-term effect this had was to homogenise colonised space in line with imperial space, leaving us today with the problem that diverse places and peoples are now homogenised into a single, formally equal political and legal form despite their differences, peculiarities and actual asymmetries. It is argued that with decolonisation, nation-states were consolidated right at the moment when it became clear that world society was moving in a different direction.

Where the previous chapter looked carefully at power, our final substantive and sixth chapter pays closer attention to the influence of the scientific system's truth communications on international law. In previous chapters technology, territory, borders, colonialism, and the communication media of power and truth were discussed. A perfect centre where all these elements converge can be found in a particular scientific practice, namely that of cartography. Without maps, it would be hard to even imagine colonialism and the law in the form that it is today. It is also shown how, in the case of the map, science can capture the legal and political

imagination, but also limit it. In order to illustrate this, attention is especially paid to the material object of the map. While maps have an important role and function within international law disputes, the net is cast much wider in this chapter. The map is taken as a good representative nexus where international law, politics and science overlap into a single complex assemblage.

The chapter begins with a theoretical account of the map. Its very materiality is regarded as an essential component of how and what it communicates. This appears slightly problematic at first from the perspective of system theory, which is primarily concerned with communication, and the material world only serving as its precondition but not theoretically necessarily very interesting. This first way in which this is overcome is through a novel reading of Luhmann's *Art as a Social System*, where the communicative power of artworks is theorised. Through reading the map as a kind of artwork, it can be inserted within the existing theoretical framework. Further support is drawn from the theory of Latour, a much more expressly materialist sociology. Through this novel combination, it becomes possible to frame both international law and the map within a single theoretical paradigm.

It is argued that maps were essential in the creation of nation-states, for a variety of reasons. Through its appeal to scientific truth, it allowed sovereigns to bolster their claims over territorial power. From the accurate borders portrayed on the surface of a map, two further things become possible: inwardly it allowed for the consolidation of a nation into a single unity under a single sovereign, and outwardly it opened the sovereign imagination towards expansion. It was also essential for the modern populational and territorial aspects of legal sovereignty. Maps had also become essential to international law. Today they have become a useful part of legal claim-making in the modern era and the law has an ever more complex relationship with the sciences because of this. However, it has also

had an ideological effect on international lawyers. By imagining the world as map that can be cut up into sovereign slices, and through its selection of what it represents and doesn't represent, people are caught into a highly selective or distinctive image of what society looks like. This cannot help but influence the way international law is practiced. It is suggested that a post-national approach to international law has many merits. Rather than the map projecting old ideals onto us, it is time to look at the world and collectively think about how we can see it differently.

5 Conclusion

The study naturally reaches its conclusion in the seventh and final chapter. The finding, that international law is locked into certain structural determinations because of its ties with the current expression of sovereignty in the form of the nation-state, is drawn. While it has undoubtedly provided some benefits, this form has also reached the limits of its potential. Lagging other social systems, it has become a major structural impediment to resolving global problems, if not actively exacerbating them. Many of the answers being offered seem to rely on an intensification or scaling up of existing structures, rather than offering original solutions. It is argued that international law is finding itself in a moment of crisis, in the sense that a decisive direction must be taken.

One possibility is proposed in the form of systemic involution. International law, as well as other social systems, need to change their operations inwardly, or what Luhmann calls "openness through closure." This proposal is of course a modest one and doesn't pretend to offer an instant fix. Instead it calls for a careful reconsideration, more research, and greater reflexivity. To some extent this will have to happen inevitably. The question is rather whether we can change course pre-emptively and preventatively, or whether the environment will force change upon society. If humanity is

to be successful in the former scenario, a careful understanding of the mechanisms of social evolution must be achieved by the legal profession, as was called for at the beginning of the thesis.