Liberalism's Warring Souls

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Compact and well-written, Jennifer Pitts's *Boundaries of the International* joins a growing field of inquiry into the history of international law.[1] Pitts sets out to challenge what she sees as the discipline's conventional narrative: that international law emerged first between free and sovereign European nations, creating an ecumene that other states would aspire to join. Instead, she shows, ideas about the 'law of nations', as it was long called, were from their beginning shaped by European commercial and colonial expansion. International legal discourse, Pitts argues, supplied both justifications for conquest and resources for a critique of the abuses of imperial power.

Pitts, who teaches political thought at the University of Chicago, has a longstanding interest in the history of these ideas. *A Turn to Empire*, published in 2005, offered a rejoinder to liberalism's more intransigent critics, acknowledging the imperial 'turn' among nineteenth-century liberal thinkers, but insisting on the cultural pluralism and anti-imperial credentials of a cohort of more admirable forerunners. Smith, Bentham and, above all, Burke, were offered as principled critics of imperialism's cruelties, exemplifying a 'strikingly non-judgemental' respect for cultural difference and a commitment to the moral equality of all. She subsequently co-edited a collection of writings by the twentieth-century Polish legal scholar Charles Henry Alexandrowicz, whose work on changing conceptions of the law of nations plays an important role in *Boundaries of the International*.

The central issue animating international legal thinkers in the eighteenth century, Pitts contends, was their field's scope. Was it truly universal, encompassing all peoples and polities, as earlier natural-law theorists of a *ius gentium* had argued, or did it stop at Europe's borders? Alexandrowicz drew a sharp line between eighteenth-century understandings of the law of nations as universal, binding European states in their relations with Asian ones—or at least with the commercial empires of the region—and late-nineteenth- century conceptions, marked by exclusion and European chauvinism. Pitts sets out to show that the picture was far messier and earlier conceptions less inclusive of extra-European polities than Alexandrowicz supposed.

Pitts begins with eighteenth-century attitudes towards the Ottoman Empire and its place within the nascent system of international law. Christian thinkers had traditionally rejected the permissibility of treaties with infidels, yet by the eighteenth century many had begun to question this. Advocates of Ottoman inclusion in the European legal order could point to a dense history of diplomatic and treaty relations: France in particular had had treaty alliances with the Sultan against the Habsburgs since 1536, and England had followed suit with commercial and diplomatic agreements. Others, though, drew on a new discourse of 'oriental despotism'—Pierre Bayle's essay '*Despotisme*' (1704) is credited with coining the d-word—to insist that the Ottomans were 'irreducibly alien in religious belief, constitutional principles

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[1] Jennifer Pitts, *Boundaries of the International: Law and Empire* (Harvard University Press 2018).

and norms of interstate relations' and thus undeserving of membership in the European legal community. At the centre of this new discourse Pitts locates Montesquieu, whose *De l'esprit des Lois* (1748) offered a picture of the Ottomans, and Asian polities more generally, as existing squarely outside European legal norms.

Montesquieu drew on the work of Paul Rycaut, secretary to the English ambassador in Constantinople from 1660–66, who described in great detail the diplomatic and legal practices of the Ottomans. Rycaut, the London- born son of Dutch Huguenots, who was also serving the Levant Company, had sought to correct an image of Ottoman 'barbarity' in the European imagination—'Men of the same composition with us' who 'cannot be so savage and rude as they are generally described'—while at the same time drawing some pointed lessons for Restoration England: 'Reason stands in no competition with the Pride and Lust of an unreasonable Minister.' Montesquieu famously depicted his three regimes of government—republic, monarchy, despotism—as distinct in nature and motive principles. While systems of civil and religious law operated within the Ottoman empire, the Sultan was not bound by them. Unlike the compact European states, whose proximity helped to develop the capacity for diplomacy and negotiation, despotism preferred to be 'surrounded by deserts and separated from the peoples it calls barbarians'. Montesquieu's approach, Pitts argues, left an imprint on subsequent debates.

Voltaire was not the only critic of *De l'esprit des Lois*. French scholars and diplomats also pushed back, alive to the complex network of trade relations at stake. The French Orientalist Abraham Anquetil-Duperron insisted in his 1778 *Législation orientale* not only on the law-governed nature of the Ottoman, Persian and Mughal Empires but on their specific respect for the law of nations and their legal obligations toward subjects and foreigners alike. Where Montesquieu depicted a rigid separation of distinct ideal types, Anquetil-Duperron saw 'variations on a universal type sharing the basic structures of law and order that exist in all societies, and that in all societies are sometimes defied, abused and neglected by the powerful'. He described an Ottoman legal system in which it was clear that 'the law of nations, the law of war, public faith, the security of property, that of commerce, in sum that the laws of humanity and of reason are respected by the Ottoman Monarchs as well as by their representatives'. For Anquetil-Duperron, it followed, they deserved inclusion in a law of nations community.

If Anquetil-Duperron offered, in Pitts's somewhat anachronizing gloss, a 'profound critique of European provincialism and racism and their connection to abuses of power', it was one that left little mark on subsequent European thinkers. While the language of 'oriental despotism' soon fell into disuse, the debate contributed to a growing consensus that non-European empires existed in a different legal universe. But in the eighteenth century such a view was not yet cast in stone, as was evident in the work of the influential Swiss jurist, Emer de Vattel. In his *Droit des gens* (1758), Vattel painted a picture of an international legal community of states premised on sovereign equality and independence. Nations were the sole judges of their own conduct, each possessing 'the right of judging, according to the dictates of her conscience, what conduct she is to pursue in order to fulfil her duties'. This account, Pitts observes, was marked by a 'resolutely universal' language of inclusion—repeated references to *l'amour universel du genre-humain*—with the law of nations applying to the 'universal society of nations' of which non-European states, too, were presumptive participants. The 'American nations' were explicitly included amongst those nations 'absolutely free and independent', with Vattel condemning those 'ambitious Europeans' who

‘subjected them to their greedy dominion’, having ‘grounded themselves on a pretext equally unjust and ridiculous’.

And yet there remained some ambiguity as to the true scope of this legal community. In describing the legal norms on which its relations rested, Vattel drew his illustrations almost entirely from European practices, leading later commentators to suggest that, far from a statement of a universal law of nature, his was merely an account of the European state system in abstract terms. Even the state itself, his privileged unit of political and legal agency, exemplified European polities—and his native Neuchâtel and other Swiss republics in particular: settled territorial communities marked by intensive agriculture. Usurpation by Europeans of ‘vacant lands’ was no violation of the law of nations, Vattel insisted.

Further ambiguity emerges from Vattel’s treatment of Muslim states. On the one hand, he argued, confessional differences were irrelevant to the law of nations, and Muslims were to be included in the international legal community: they too recognized such foundational touchstones of the law of nations as the obligation to fulfil treaties and the inviolability of ambassadors; Europeans should be bound by that law in dealings with them. On the other hand, concrete examples once more cast Muslim states as inherently untrustworthy, their habitual violence a threat to a lawful community of states: ‘all Christian nations ought, independent of all bigotry, to have considered [the Ottomans] as enemies’ since they ‘made it their profession to subdue by force of arms all who would not acknowledge the authority of their prophet.’ Religious difference was irrelevant to treaty obligations—and yet the law of nations, Vattel insisted, forbade alliances with the followers of a violent, oppressive religion. Some, like the Inca ruler Atahualpa, ‘whose rights under the law of nations were violated by the Spanish when they killed him in 1533’, were in; others—entire nations labelled ‘monsters, unworthy of the name of men’ and ‘enemies of the human race’—out.

Still, Pitts insists, we should take Vattel’s universalism seriously ‘on its own terms’. His was a casuistical form of argument, offering ‘principled grounds for taking either position, for including Muslim states in the net- work of treaty relations or for excluding them, leaving it to the statesman or diplomat making use of the text to establish the relevance of the abstract category for the case at hand’. Ultimately, she argues, Vattel’s law of nations was not exclusively European. ‘What distinguished Europe from other parts of the world was not the law of nations, nor even, primarily, a separate and more detailed body of legal conventions . . . but rather a set of political and diplomatic practices’. Europe was a ‘subset of the larger society of states’, the latter too based on reciprocal and binding legal arrangements.

Irrespective of Vattel’s own commitment to the abstract universalism of *Droit des gens*, in the hands of others his rhetoric, Pitts acknowledges, could provide a justification for colonial expansion. A law of nations that projected what were ultimately European principles, institutions and practices as presumptively universal obligations provided ‘a means by which to foist parochial normative judgments on others’. Yet Vattel’s vision also, she insists, provided a fruitful basis for criticism of imperialism. Here Pitts returns to a key figure from *A Turn to Empire*, Burke, cast once more in apologetic mode as defender of an inclusive law of nations. His closing argument to the 1794 impeachment trial of Warren Hastings offers a ‘distinctive vision of the international legal order’. Echoing Anquetil-Duperron, Burke pronounced ‘every word that Montesquieu has taken from idle and inconsiderate Travellers absolutely false’ and rejected Hastings’s depiction of a lawless subcontinent. Indian society, he insisted, was structured by a multiplicity of legal orders—British and Indian, but also natural law and the law of nations—which agents of empire were obliged to recognize and

respect. Indian sovereigns could be expected to abide by treaty obligations, so that ‘in Asia as well as in Europe the same Law of Nations prevails, the same principles are continually resorted to’.

A similar view, Pitts suggests, can be found in the legal opinions of Admiralty judge William Scott (later Lord Stowell). Like Burke, he called for the recognition of state sovereignty beyond Europe, pointing to a long history of European treaty relations with extra-European powers. At stake in Scott’s Admiralty cases were competing property claims between Europeans and North Africans arising from maritime seizure. Where earlier natural- law theorists like Alberico Gentili had dismissed the Barbary communities as pirates, denying them any legal recognition, Scott insisted their sovereignty should be recognized under the law of nations. ‘Certain it is’, he wrote, ‘that the *African* States were [considered pirates] many years ago, but they have long acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal states’. The Barbary states may not have followed the law of nations in all its particulars, but this did not mean they were lawless or that Europeans might force their own standards upon them.

The Burke and Scott who emerge from Pitts’s pages are hardly full- blooded anti-imperialists. If Asian and North African commercial states were members, with Europeans, of a shared legal community, other societies deemed ‘savage’ remained outside it. Burke, for instance, was hardly making a case for the inclusion of Native Americans, whom he dismissed as ‘fierce tribes of Savages and Cannibals’. Still, Burke and Scott, like Anquetil- Duperron before them, offered an ‘expansive conception of the law of nations’. Although a minority view even in their own lifetimes, this position did, Pitts insists, provide ‘the framework for a powerful line of critique of imperial injustices’ that, she shows, had ‘resonance in public debates’ of the time. And yet little trace of them would remain in the period that followed. The nineteenth century has long been seen as a ‘watershed moment’ in the development of international legal thought. A natural-law basis for the law of nations was too abstract and indeterminate for a new generation of empiricist jurists seeking to set international relations on a scientific basis. The business of modern states required a firmer footing: a positive law of nations based on clear rules explicable from concrete practice. Alongside this well-rehearsed story, though, Pitts traces a further transformation: the emergence of historicism as a defining characteristic of the new international-law discourse, with an attendant entrenchment of ‘Eurocentrism’.

Early positivists, like the Göttingen law professor Georg Friedrich von Martens, already tended to restrict themselves, in explicating the content of a positive law of nations, to the written agreements and state practice of European states. Subsequent writers, like the American diplomat Henry Wheaton, went further, offering an explicitly evolutionary account of the law of nations as the product of Christian Europe. ‘So entirely distinguished is the international law of Christendom, from that which prevails among the other classes of nations which people the globe’, Wheaton argued in his *Elements of International Law* (1836), ‘that there is no law of nations universally binding upon the whole human race’. Gone were the universal principles of the natural-law thinkers: ‘there is no universal and immutable law of nations, which all mankind, in all ages and countries, ancient and modern, savage and civilized, Christian and Pagan, recognize in theory or in practice, profess to obey, or in fact obey’.

If the law of nations was a historically particular product of early-modern Europe, what relevance did it hold beyond Europe's borders? 'The public law of Europe', Wheaton suggested, 'is no more obligatory upon the Asiatic and African nations, than the municipal code of any one state of the world is applicable to another'. This was not to say that non-Europeans need remain outside the reach of international law forever. 'The more recent intercourse between the Christian nations of Europe and the Americas and the Mohammedan and Pagan nations of Asia and Africa indicates', Wheaton conceded in a revised edition of *Elements*, a 'disposition, on the part of the latter, to renounce their peculiar international usages and adopt those of Christendom.' The Chinese Empire, in the wake of the first Opium War, he happily observed, had been 'compelled to abandon its inveterate anti- commercial and anti-social principles' and, he added with no hint of irony, 'to acknowledge the independence and equality of other nations in the mutual intercourse of war and peace'.

The law of nations might be the unique product of (a presumptively superior) European civilization, but in the progressive historical narrative of Wheaton and the Victorian international lawyers who followed, Pitts shows, Europe and its law were repeatedly reified as humanity's *telos*. European legal particularism, 'a global legal system in embryo', was held to have 'normative validity' for 'the future of the world as a whole'. In the work of jurists like Travers Twiss, Henry Maine, Robert Phillimore, John Westlake, William Edward Hall and James Lorimer, the law of nations was associated squarely with a community of 'civilized' states. For Hall, its 'principles cannot be supposed to be understood or recognized by countries differently civilized'.

Civilization, then, was now the gatekeeper of an international legal com- munity, the standard by which membership was to be judged. On what civilization in practice amounted to, there was little agreement. John Stuart Mill excluded 'barbarians' on the basis that they 'cannot be depended on for observing any rules. Their minds are not capable of so great an effort'. For Twiss, the standard was rooted in religion, while in Lorimer's hands, it took on a biological basis, civilizational differences mapped onto 'ethnical differences which for jural purposes we must regard as indelible'. Westlake bluntly maintained that international law was constituted by 'the rules which are internationally recognized between white men'. Whether based on powers of mind, religion or race, civilizational deficiencies justified for these thinkers a 'suspension of legal norms in European relations with non- European societies'. In practice, it hardly needs saying, this was a license for imperial aggression. Lorimer advocated the invasion of Constantinople, while Westlake could confidently predict that '[t]he inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied'.

Not all Victorian writers were convinced that civilization should be the pivot on which admittance to an international legal community should turn. Pitts goes on to consider more critical voices. The linguist, diplomat and Muslim convert Henry Stanley denounced the hypocrisy of the new civili- zational discourse and the chauvinism of its purveyors. His contemporaries were 'setting aside [the] principle of equality amongst nations, by fanciful divisions of civilized and uncivilized', simply substituting these for religious grounds of exclusion, with civilization measured in terms of everything from the study of Latin to volume of daily newspapers—in short, simply a means 'to proscribe those who differ from the persons who utter it'. Of course, like Burke, Stanley's universalism had its limits: the Chinese should not be deprived of their rights under international law, but those of 'the Feejee Islanders, or other cannibals' were of no such concern.

If they remained a minority, far from power, these voices are nonetheless an important part of Pitts's story. Through her close reading of a sweeping range of texts, from political theorists to jurists and diplomats, along with a cast of largely forgotten minor publicists, Pitts weaves together a nuanced history of competing ideas about international law. It is, though, an almost entirely European (and largely British and francophone) cast. We hear almost nothing of the discourse of international law used by those on the receiving end of imperial violence. She dismantles the field's simplistic narratives, recovering dissenting voices and revealing the historical contingency of an evolving discourse and the indeterminacy of its central concepts—universalism, say, at once a defence against European parochialism and a means of holding non-Europeans to standards hammered on the anvil of colonial needs. Pitts is clear this was not a level playing field, charting the consolidation of a legal discourse that inscribed substantive inequalities and relations of domination in legal form overdetermined by its imperial context.

Yet the discussion of that context, clearly so important for understanding the changing nature of international legal ideas, remains superficial. In staying largely at the level of discourse, and eliding its material determinants, the book bears the impress of the Cambridge School and its insistence that historical texts and political discourses be interpreted strictly within their immediate semantic universe. Elsewhere, Pitts has made her disciplinary commitments apparent, accusing international lawyers who stray beyond empiricist methods of textual interpretation of engaging in 'mythmaking rather than historical argument' and 'smuggling in a kind of normative judgement in the form of historical narrative'.

In *Boundaries of the International*, Pitts is clear that there exists a relation- ship between international law and legal discourse, on the one hand, and European imperial expansion, on the other. And yet, as one reviewer has observed, 'European imperial power operates as no more than a nebulous background context'. Its material basis, and political economy generally, are simply elided. We learn that Vattel lost his status as the preeminent inter- national legal theorist in Europe when his universalism sat uncomfortably with 'the dominant political position in a European imperial state' such as Britain in the context of the first Opium War; that Burke and Scott grappled with the circumstances faced by British agents in a world marked by 'global commerce and global imperial expansion'; and that Victorian international lawyers honed their theories of European superiority against the back- ground of the Crimean War. But such euphemisms hardly shed light on the dynamics of imperialism or its concrete relationship with international law. We read of the 'new professional class of European international lawyers' that emerged in the latter half of the nineteenth century and the relevance their theories to the practices of European imperialism. Remaining at the level of discourse, Pitts's gloss offers no insights into what those concrete practices were or the specific relationship between legal changes and an intensifying system of specifically industrial-capitalist exploitation—indeed, capitalism itself is a concept foreign to Pitts's narrative. Imperialism itself remains largely static; the striking emergence of an aggressive phase of rivalrous international expansion precisely in the nineteenth century that famously catalysed a new tradition of theorizing on imperialism—let alone how it might have shaped the ideational changes Pitts describes—goes entirely unremarked.

What of Pitts's claim to have corrected international law's conventional origins story, revealing the law of nations to be a response to interactions between European and non-European societies and not the child of a self- contained European state system, only later projected outwards onto the world? Certainly, her narrative, rich with supporting textual illustration, amply supports the former, but there is little novel these days about this

argument. The ‘conventional narrative’ was long ago undermined by critical scholars, especially those working within the Third World Approaches to International Law tradition. Antony Anghie argued trenchantly almost two decades ago that the colonial encounter was central to the constitution of international law and its doctrines—in the eighteenth century, as Pitts suggests, but also earlier. If liberal international lawyers tend to relegate the colonial origins of their discipline to its past, insisting it is of little relevance in a postcolonial era, few question its imperial foundations.

Where Pitts does shed new light is in showing just how central inter- national law, at least prior to its professionalization in the late-nineteenth century, was to popular political discourse in Europe. The participants in the debates she maps included not only jurists but also diplomats, politi- cal thinkers, legislators, historians and publicists of various stripes. As Pitts observes, until the consolidation of international law as an academic discipline, ‘the law of nations was a language and framework for political argument used broadly in public debates and works of political thought’. She repeatedly draws attention to the ‘nonlawyers who used the language of international law in public forums’. Turning her gaze to the present day, Pitts looks hopefully on a renewed democratization of international- law discourse: ‘the current historicizing moment has brought scholars of international law into conversation with those of other disciplines, including history, anthropology, international relations and political theory’. This, she suggests, ‘may make possible something like a return to the pre-disciplinary status of international law as a discourse available to a wider array of writers, thinkers and publics’.

Burke is once more Pitts’s model, his aim in the Hastings trial ‘as much moral persuasion as legal conviction’ and his invocation of the law of nations ‘political as much as juridical, intended to influence government and East India Company policy and the public perception of British conduct in India as much as to inform the Lords’ decision’. Westlake is also quoted approvingly, at least on this count: ‘International law being the science of what a state and its subjects ought to do or may do with reference to other states and their subjects, everyone should reflect on its principles who, in however limited a sphere of influence, helps to determine the action of his country by swelling the volume of its opinion’. International law, Pitts insists, contains ‘resources for critique and frameworks for envisioning greater justice and equity’. Might international law once more become, as she hopes, ‘the instrument of an educated citizenry’, wielded to denounce injustice and the abuses of imperial states? Her own study of its history suggests it was never particularly well suited to this task, its entanglements with imperialism too indelible.