Bringing the Private back into International Law

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This short paper in its essence deals with a clash of jurisdictional grounds. One of contemporary international law's -both public and private- main starting principles is that of a territorial Sovereign State: a State has full control and jurisdiction over everyone and everything on and in its territory.[2] However, this is actually a remarkably novel idea.[3] International law's original meaning undisputedly refers to the law between nations or peoples, as is still evident in the German term for international law, *Völkerrecht*, and in the alternative 'out-dated' Dutch term *volkenrecht* and the French term *droit des gens*. The different nations of the past were however not the territorial sovereign nation states of our present day international law.[4] Nations were (and can still be) rather more broadly defined on the basis of a common cultural, religious, tribal, city or another territorial affiliation (such as a mountain valley).[5] Throughout most of history it was common that your home nation's laws followed you elsewhere.[6] In the medieval county of Flanders for example, many cities had their own laws and customs and many of these followed the burghers of a city when they moved to another city.[7] Jurisdiction and applicable law were therefore often defined by your personal background (=personal jurisdiction), rather than by territorial jurisdiction.[8]

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[2] H.L. BUXMAN, "Territory, Territoriality, and the Resolution of Jurisdictional Conflict", *American Journal of Comparative Law* (2009) 57:3, 676.

[3] M.A. MIHATSCH & M. MULLIGAN, "The longue durée of extraterritoriality and global capital", *Culture, Theory and Critique* (2021).

[4] T. JOUANNET, *A Short Introduction to International Law* (translation C. SUTCLIFFE), Cambridge, CUP, 2014, 17-18. For example see Vattel who clearly states that the law of nations is the law of sovereigns (p. XXIII) and who gives a non-territorial definition to the nation ("*une nation ou un état est (...) un corps politique ou une société des hommes unis ensemble pour procurer leur avantage & leur sûreté à forces réunis"* - M. DE VATTEL, *Le droit des gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains, Tome 1*, London, 1758, 17.

[5] E. RENAN, *Qu'est-ce qu'une nation*, Paris, Calmann-Lévy, 1882, 30p.

[6] S.L. GUTERMAN, "The Principle of the Personality of Law in the Early Middle Ages: A Chapter in the Evolution of Western Legal Institutions and Ideas", *U.Miami L.Rev* (1966), 259 - 345

[7] E.M. MEIJERS, *Het West-Vlaamsche erfrecht*, Haarlem, Tjeenk Willink, 1932, 15-18

[8] E.M. MEIJERS, *L'histoire des principes fondamentaux du droit international privé à partir du Moyen Age: spécialement dans l'Europe occidentale* (Recueil des Cours - Académie de Droit International), Paris, Sirey, 1935, 144p.

Local rulers very often granted such legal concessions in order to attract foreign merchants and communities.[9] Members of multiple nations could therefore often be found living together in one city under their own laws. For example in medieval Bruges, numerous nations such as the Catalans, Genoese, Venetians, Biskayers, Germans (*Hanse*) etc. all had their own nation houses, which housed amongst other things their consular courts.[10] As such there were often multiple possible *fora* within one city that could handle 'international' legal disputes, i.e. between members of different nations. This lead to an early format of forum shopping and an embryonic system of private international law or conflict of laws (or 'private law of nations'?) to regulate such conflicts.[11] This system of personal jurisdiction and special districts for foreigners was so widespread, from medieval Bruges to the Mediterranean and far beyond including in western Africa, China, Persia and the Indian subcontinent that it can be deemed to have been quasi-universal and the global trading norm.[12] Individuals themselves could directly call upon these treaties or capitulations against locals and local officials to ensure the protection of one's own consular court and laws, although this was certainly not always a given.[13]

The above-system remained in place in Europe until the rise of the territorial nation state and the construction of the concept of territorial jurisdiction, starting from the Peace of Westphalia, which only very gradually chipped the old system away.[14] Over time and following the different waves of colonisation and imperialism, this European idea of the territorial nation state seemingly gradually displaced the original 'nation' and international law as we now know it gradually started to emerge.[15] Personal jurisdiction

[9] U.ÖZSU, "The Ottoman Empire, the Origins of Extraterritoriality, and International Legal Theory" in A. ORFORD and F. HOFFMAN (eds.), *Oxford Handbook of the Theory of International Law*, Oxford, OUP, 2016, 124-137.
[10] O. GELDERBLOM, *Cities of Commerce: the Institutional Foundations of International Trade in the Low Countries, 1250-1650*, Princeton, Princeton University Press, 2013, 109-114
[11] *ibid*. chapter V.
[12] L.A. BENTON, *Law and Colonial Cultures : Legal Regimes in World History 1400-1900*, Cambridge, CUP, 2002, 31-126; S.S. LIU, *Extraterritoriality: Its Rise and Its Decline*, New York, Columbia University Press, 1925, 5-47.
[13] As capitulations were a unilateral privilege they could also be unilaterally revoked and this often happened in times of political crises or war.
[14] J. PITTS, "Empire and Legal Universalisms in the Eighteenth Century", *American Historical Review*, 117 (2012), 93; R.T. FORD, "Law's Territory (a History of Jurisdiction)", *Michigan Law Review*, Vol.97, 4, 843-920.
[15] M. KOSKENNIEMI, "International Law and *Raison d'état*: Rethinking the Prehistory of International Law," in B. KINGSBURY & B. STRAUMANN (eds), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire*, Oxford, OUP, 2010, 297–339; JOUANNET, I*ntroduction, op.cit.*, 4-21

however endured with many imperial powers employing different courts for colonisers and for locals in the areas they fully controlled and colonised.[16] The term *intergentiel* or intergentile law i.e. the law between different *gens* or peoples was amongst others used for solving the conflicts between these different jurisdictions all falling under a single state order.[17] Such pluralistic legal conflicts of law -now known as private interpersonal law- still exist in numerous states.[18] Later, the concept arguably morphed into extraterritoriality and mostly became a unilateral privilege for westerners in non-colonised or 'uncivilised' nations in order to protect those westerners and western companies coming from a territorial nation state from the 'barbaric local legal customs' via the extraterritoriality provisions enshrined in Capitulations and the so-called Unequal Treaties.[19]

It was therefore absolutely normal that when in 1934, the Belgian national C.A. Haemelinck, service manager at Cathay Motors, drove over a rickshaw carrying the 12-year-old Russian girl Lyda Malinovsky on the *Avenue du Roi Albert* in the French Concession of Shanghai, that he was tried before an ad-hoc Belgian consular court in Shanghai under Belgian law.[20] The girl unfortunately died in the hospital; the Chinese puller of the rickshaw, Ki King-chang, survived and was a witness during the trial, as were some bystanders. Haemelinck was fined Gold Fr. 100, sentenced to six months' imprisonment and was ordered to pay 7000 USD compensation to the parents.[21] Likewise, it was just as normal that a Dutch company operating in Egypt before 1949 could sue its failing Egyptian subcontractor before the Mixed Courts of Egypt or that in the Tangier International Zone, a local French employee could sue his local English employer for a work accident before the Mixed Court of the Zone until 1956.[22]

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[16] For example in Mughal India -the Mughals likewise were arguably a foreign imperial power in India- see: M. L. ROY CHOUDHURY, "Principles of Law in the Mughal Empire", *Proceedings of the Indian History Congress*, *10 (1947)*, 367–370

[17] M. VERSTRAETE, "Intergentiel Recht", *Rechtskundig Weekblad* Vol. 9 nr.31 (1940), 1169-1178; R.D. KOLLEWIJN, *Intergentiel Recht in Algerije*, Amsterdam, Noord-Hollandsche Uitgeversmaatschappij, 1956, 26p.

[18] G.W. BARTHOLOMEW, "Private Interpersonal Law", *The International and Comparative Law Quarterly*, *1*(3), 1952, 325–344.

[19] ÖZSU, *Ottoman Empire, op.cit.*

[20] *Haemelinck*, Belgian Consular Court, Shanghai 1934 as reported in the *North China Herald*, 27 June 1934 (can be found at: https://www.law.mq.edu.au/research/colonial_case_law/colonial_cases/less_developed/china_and_japan/1930-1941_decisions/haemelinck_1934/ (last accessed 14 May 2021).

[21] *Ibid.*

[22] These are fictional examples (though such cases undoubtedly existed) but cases as these were absolutely normal in Egypt in Tangier. See for the Mixed Courts of Egypt (1876-1949): J. BRINTON,

Consular and mixed courts were both global phenomena and were often places of legal exchange, especially the mixed courts with their international (mostly western) bar, bench and prosecution office, and (sometimes a strong) local involvement. They somehow employed different legal traditions to solve 'mixed' cases (i.e. cases involving a mixed or foreign element).[23] The international legal order in which Haemelinck lived was therefore still very much fluid and co-defined by personal jurisdiction. Only with the establishment of the UN and decolonisation did personal jurisdiction become quasi-fully displaced by territorial jurisdiction in international law. Even so, the last consular court only closed in 1971[24], the last mixed court in 1980[25] and the last specific court for foreigners only in 2003.[26]

Yet this 'personal' history is often missing in the history of international law, with mixed courts for example being such a severely understudied field that there is not even a complete list of all mixed courts that were in existence. Even in contemporary Private International Law the topic is not often touched upon as many of such personal jurisdiction questions have become 'national': they mostly arise in personal status matters in mixed jurisdictions such as Egypt.[27] It must not be forgotten that contemporary Private International Law itself is based on the territorial nation state as it only regulates legal disputes that are 'international', *i.e.* cross-territorial nation state border. However, the essence of Private International Law, namely the regulation of private relationships between different jurisdictions, and its three traditional main questions: (i) which court has jurisdiction, (ii) what is the applicable law and (iii) how is a foreign judgment/award recognised and enforced, have always been asked and studied throughout history, albeit under different names.[28] For example, in the

"The Closing of the Mixed Courts of Egypt", *American Journal of International Law* 44(2) 1950, 303-312 and for the Mixed Court of Tangier (1925-1956): M. ERPELDING & F. RHERROUSSE, "The Mixed Court of Tangier", *Max Planck Encyclopedias of International Law* (2019)

[23] M. ERPELDING, "Mixed Courts of the Colonial Era", *Max Planck Encyclopedias of International Law* (2020)

[24] B.S.B.A AL-MUHAIRI, "The Development of the UAE Legal System and Unification with the Judicial System", *Arab Law Quarterly* 11(2) 1996, 126

[25] BBC NEWS, *Vanuatu Country Profile*, 11 June 2018, https://www.bbc.com/news/world-asia-16426193 (last accessed 14 May 2021).

[26] M. DEEHRING, "The emerging legal profession in Qatar: Diversity realities and challenges", *International Journal of the Legal Profession*, 27(3) 2020, 221

[27] Art. 3 of the Egyptian Constitution of 2014; M. BERGER, "Public Policy and Islamic Law: The Modern Dhimmi In Contemporary Egyptian Family Law", *Islamic Law and Society*, 2001, 88-136.

[28] There is little study of non-European historic conflict of laws systems, leading to many to think that this is of an exclusively western or colonial origin. OKOLI & OPPONG for example note that for Nigeria:

aforementioned medieval county of Flanders, if a 'foreign' burgher came before another cities' court, that court would use intercustomary law (*droit intercoutumier / intercoutumaal privaatrecht*) -as in a clash between different customary jurisdictions- to define its jurisdiction and the applicable law.[29] The aforementioned private interpersonal law is another example.

This regulation of private trans-jurisdictional relationships often took centre stage in many international (trade) treaties of the past, as it allowed foreign nations to regulate and protect their kinsmen and merchants abroad.[30] Both private and public international law's history are thus inextricably entangled.[31] In fact, in order to fully understand many of the present principles of public international law, one needs to be aware of their full history - both their personal and territorial origins. One can for example only truly grasp the concept of extraterritoriality today if one is aware that for a large part of history this was a normal international trading practice that entailed that foreigners to have their own legal and court system 'follow' them abroad.[32] Similarly, the debate about international legal personality gains a different angle if one is aware that in the past individuals undeniably had such personality in the past as they could in many cases directly invoke treaties *vis à vis* the local ruler or invoke a certain legal status to gain a better treaty-protected position; especially so if it is reminded that such systems continued to exist until deep into the 20th century. Likewise, the establishment of public international and regional courts and institutions is again to be viewed differently if one knows that there were often personal links with the mixed and consular courts. For

"*With the exception of one notable scholarly work, jurists have largely neglected the history of Nigerian private international law. Their discussion of the subject often starts from the date when English law was received into Nigeria. No serious inquiry has been made into the position before this period Nigerian writers seem to content themselves with an a priori conclusion that the Nigerian pre-colonial legal regime did not have private international law rules and, by extension, such problems, but this is not entirely accurate. This is because the socio-economic intercourse among people of diverse backgrounds and diversity of legal regimes – two factors that lay the foundation for conflict of laws problems – were present in pre-colonial Nigeria."* They then go on to state that most likely much of the problems were solved ad-hoc according to the *lex fori* and that the prevailing Islamic law in the North did not allow too many openings for a real conflict of laws system. However, we simply do not (yet?) know. See: C.S.A. OKOLI & R.F. OPPONG, *Private International Law in Nigeria*, Oxford, Hart, 2020, 5-6

[29] MEIJERS, *Het West-Vlaamsche erfrecht, op.cit.,* 15-18

[30] Already in the very first treaties known to us are there provisions for foreigners travelling abroad, especially for merchants. See: S.C. NEFF, *Justice Among Nations: a History of International Law*, Cambridge (US), Harvard University Press, 2014, 14

[31] A. Mills, "The Private History of International Law", *The International and Comparative Law Quarterly*, *55*(1) 2006, 1–50.

[32] The exact demarcation between personality of laws/personal jurisdiction and extraterritoriality remains an open and complex question.

example Arnold Struycken, the first political director of the Council of Europe, served as a Dutch judge at the Mixed Courts of Egypt in their closing days.[33] Numerous other such examples exist.[34]

I thereby follow MILLS in his plea for re-emphasising the private in international law, as too often now international law only refers to public international law and private international law is wrongly deemed to be domestic law.[35] This is especially required in the field of the history of international law. By doing so we can integrate the role played by numerous individuals, scholars, merchants, companies and tribes in developing international law. Perhaps most importantly, this allows for a decentring of the history of international law, which largely remains captive to the history of territorial and thus western international law. Our current day international law is therefore seemingly completely western-based and steeped in imperialism.[36] It is undeniably true that ultimately the relationships and balance of power in the late 19th century-early 20th century became unequal with the western imperial powers dominating and eventually shaping the development of international law to their territorial, economic and 'civilizational' image, which has left a lasting impact.[37] However we must not forget that many of the international law concepts employed for such domination and colonisation such as personal jurisdiction/extraterritoriality were ancient and quasi-universal for most of their history. Even at the height of western colonialism did the western imperial powers not hold a monopoly on these concepts: the Persians for example had extraterritorial rights and consular courts in Egypt in 1917.[38]

Also for the present day is such an integrated and decentred look useful. For example, there seems to be a trend towards unilateralism or 'de-internationalisation' in

[33] BRINTON, *Closing*, *op.cit.*, 303.
[34] M. ERPELDING, "International Law and the European Court of Justice: The Politics of Avoiding History", *Journal of the History of International Law/ Revue D'histoire Du Droit International*, *22*(2-3), 2020, 446–471.
[35] MILLS, *The Private History of International Law*, *op.cit.*, 1.
[36] A. ANGHIE, "Imperialism and the International Legal Theory", in A. ORFORD and F. HOFFMAN (eds.), *Oxford Handbook of the Theory of International Law*, Oxford, OUP, 2016, 156-172.
[37] N. TZOUVALA, *Capitalism as Civilisation*, Cambridge, CUP, 2020, 44-128.
[38] *Salem Case*, United States (on behalf of Salem) v Egypt, Award, (1949) *II RIAA 1161*, (1945) 6 ILR 188, 8th June 1932, p. 1168

International Economic Law.[39] Numerous mostly non-western states are establishing specialised international commercial courts - many of which have foreign judges and apply foreign laws by default- that could act as an alternative to the investor-state arbitration mechanism in some instances in the near future.[40] These 'internationalised' national courts mostly seem to remain under the radar of public international lawyers so far, exactly as the mixed courts of the past, despite their potentially game-changing nature. Yet these international commercial courts are an active topic in the Private International Law field.[41] Conversely, the field of Private International Law itself is largely blind to certain comparisons that these international commercial courts have to for example the hybrid courts of international criminal law.[42]

Only by bringing back the private/personal to international law can we again start to see the full picture of the past and present. This 19th century division has been blinding us for far too long.[43] For what else is international law in its essence but a system to solve conflicts of/in law and jurisdiction between nations?[44]

[39] G. DIMITROPOULOS, "International Commercial Courts in the 'Modern Law of Nature': Adjudicatory Unilateralism in Special Economic Zones", *Journal of International Economic Law* (forthcoming 2021)
[40] W. THEUS, "International Commercial Courts: a New Frontier in International Commercial Dispute Resolution" in *European Yearbook of International Economic Law* (forthcoming 2021).
[41] Though they are a quite recent development (only in 2004 was the first international commercial court established), there has already been quite some work on them. See for example the overview work (which still lacks certain courts): X. KRAMER & J. SORABJI (eds.), *International Business Courts: A European and Global Perspective*, Den Haag, Eleven International Publishing, 2019, 296p.
[42] R. MUHARREMI, "The Concept of Hybrid Courts Revisited: The Case of the Kosovo Specialist Chambers" *International Criminal Law Review*, 18(4), 2018, 623–654. Both the Private International and Criminal Law fields seem to be blind to the colonial mixed courts, which had both civil and criminal competences.
[43] MILLS, *The Private History of International Law*, *op.cit.*, 47–50.
[44] A.S. DE BLECOURT, "Overzicht Van In De Jaren 1914-1925 Gepubliceerde Rechtsbronnen En Literatuur Betreffende Oud-Vader-Landsch Recht - Noot bij E.M. MEIJERS, Bijdrage tot de geschiedenis van het internationaal privaat- en strafrecht in Frankrijk en de Nederlanden (1914)", *Tijdschrift voor Rechtsgeschiedenis,* Vol. 7, Issue 1 (1927), 87.