Regionalism, Geography, and the International Legal Imagination

Carl Landauer
Regionalism, Geography, and the International Legal Imagination
Carl Landauer*

Abstract

Despite international law's identity as focused on spatial relations, it has long been dominated by a temporal, narrative imagination. This article argues for an increased spatial conception of international law, but one that is also culturally and temporally enriched. It begins with a section called "Regionalism without the Region," which describes how efforts at emphasizing the region in international law are often empty of regional content—that is, of true locality. Then, in a section on "Globalization without the Globe," the article describes how globalization studies have focused on globalization as a process—that is, on the "ization" rather than the "globe" and, consequently, the real geographical impact. Finally, in a section entitled, "Westphalia without the West," the article takes on the Westphalian myth and suggests that the Westphalian state system was never fully in place and if so only for the briefest of moments—even in its supposed epicenter. In sum, international law has adopted so strong a narrative mode that it is ultimately more interested in mapping than maps, losing sight of geographical specificity.

Table of Contents

I. Introduction: Time for Space .................................................. 558
II. Regionalism without the Region ............................................. 562
   A. Alvarez's American International Law ................................ 562
   B. Elias's African International Law ...................................... 564
   C. Singh's Indian International Law ...................................... 567
   D. Okafor's African Human Rights System .............................. 568
   E. Regionalism, the UN, and Fragmentation ............................ 569
III. Globalization without the Globe .......................................... 571
   A. Narrativizing Globalization ............................................ 571
   B. Narratives of Redemption and Declension ............................ 573
I. INTRODUCTION: TIME FOR SPACE

We might assume that international law, being international law, is fundamentally about geography. Is it not largely about how the world is carved up into geographical units? We might think not only of the list of International Court of Justice cases about borders, arbitration decisions over the path of waters that turn to seemingly arcane concepts like the thalweg, and all those discourses about the reach of territorial waters; but we might also think of acts of war, the international trade regime, and the Law of the Sea. Is not international law ultimately about who possesses what territory and who can do what where?

Although that is what one might assume, I would argue that there has long been a strong temporal, narrative tradition in the discipline of international law that has captured the international legal imagination. Roscoe Pound was right when, in a lecture published in the first issue of the Bibliotheca Visseriana in 1923, he argued that modern scholarship about international law is distinct from older international law theories because its intellectual foundation is historical rather than philosophical. And Edward Gallaudet began his Manual of International Law by asserting that “[t]he student of international law being at the same time a student of history, the attention of the reader must first be directed to the leading events which have suggested and developed the law of nations.”

One of

* Carl Landauer, general counsel for LOYAL3, taught history at Yale, Stanford, and McGill Universities, and international legal theory at the University of California, Berkeley, School of Law. The author would like to thank Susan Landauer, Christian Nwachukwu Okeke, Tim Sellers, and Robert Stacey for their contributions to this essay, and the School of Oriental and African Studies of the University of London for hosting a paper version of this article.

1 Roscoe Pound, Philosophical Theory and International Law, Lecture Delivered in the University of Leiden, in 1 Bibliotheca Visseriana Dissertationum Ius Internationale Illustrantium 71, 73 (1923).

the signs of the temporal orientation of the international legal imagination is the long tradition of textbooks in international law beginning with the history of the discipline, whether extending over the forty pages that H.W. Halleck devoted to the “History of International Law” at the start of his International Law or J.L. Brierly’s forty-page chapter on “The Origins of International Law” that begins his own classic The Law of Nations. And Antonio Cassese’s recent international law textbook starts with a five-chapter Part I devoted to the “Origins and Foundations of the International Community.” Occasionally, scholars of international law acknowledge the role that the temporal and the narrative plays in informing the international legal imagination even if one rarely finds the self-consciousness about this fact of the 2007 collection of essays, Time, History and International Law.

Despite this temporality, there have recently been important voices calling for an emphasis on geography in law, as exemplified by the essays collected in The Legal Geographies Reader in 2001, where the editors asserted that “[i]f social reality is shaped by and understood (or constituted) in terms of the legal, it is also shaped by and understood in terms of space and place.” Specifically, within international law, Hari M. Osofsky—trained as a geographer as well as a lawyer—has called for a geographical approach to international law.

---


6 Nicholas Blomley, David Delaney, and Richard T. Ford, eds, The Legal Geographies Reader: Law, Power, and Space xv (Blackwell 2001). See also Nicholas K. Blomley, Law, Space and the Geographies of Power 227 (Guilford Press 1994) (advocating “pushing against the intellectual closure of Law and Geography as academic disciplines and the reified closure of law and space as analytical categories”).

article, I would like to provide a critique of an international legal discipline that is inherently geographical in frame yet somehow, because of its narrative and temporal mode of thought, deprives itself of its geographical essence. To do that, of course, is not to underplay the historical and the temporal. As the great French theorist of space Henri Lefebvre argued forcefully, space is historically produced and its representations change over time so that every society “produces a space, its own space.” Moreover, representational space—the space of any cultural practice—“implies time.” Although the great French neo-Marxist showed himself to be more French than neo-Marxist when he described social space as “reminiscent of flaky mille-feuille pastry,” his image of multiple layers, ultimately cultural, is very instructive in its blending of spatial and temporal specificity.

I do want to emphasize the temporality of the spatial. Even the most visually oriented studies of painting tend to describe how the viewer’s eye is “drawn” to certain compositional elements or “moves” across “passages” of the oil canvas. William Heckscher, an eminent art historian and student of Erwin Panofsky, once told me that he required his art history students to sit for two hours before a single canvas. A two-dimensional painting emerges over time. And Heckscher was also one of the great practitioners of iconology—the cultural, intellectual, and historical investigation of symbols that followed the evolution of their meaning. Similarly, with my critique of the loss of space in international law, I do not want to lose sight of the cultural and historical character of that space.

In the first section of this essay, “Regionalism without the Region,” I will address prominent attempts over the last century to focus on the importance of regions or regional institutions in international law. I will describe how Alejandro Álvarez and Taslim Olawale Elias urge the international legal significance of Latin America and Africa, respectively, but in a way that ultimately undermines their regions’ distinctiveness; how Nagendra Singh’s celebration of the tradition of international law in India similarly portrays it as providing precedents for modern international law; how Obiora Chinedu Okafor’s advocacy for the effectiveness of African human rights institutions does not suggest any regional content; how the various essays collected in the Regionalism and the United Nations in 1971 are finally about technique and process, rather than regional distinctiveness; and how regionalism in Martti

---

geography into the legal history of European empires. See generally Lauren Benton, A Search for Sovereignty: Law and Geography in European Empires, 1400–1900 (Cambridge 2010):

8 Henri Lefebvre, The Production of Space 31 (Blackwell 1991) (Donald Nicholson-Smith, trans).
9 Id at 42.
10 Id at 86.
Koskenniemi’s International Law Commission report is defined as only another flavor of fragmentation. Although these writers advocate the importance of a particular region or the use of regional international bodies, both get subsumed into international law writ large, ultimately losing their regional specificity.

In the second section, “Globalization without the Globe,” I will argue that much of the writing on globalization seems to pay more attention to the “-ization,” that is, the process, than to the globe. There is, many argue, something radically new that signals a gain to be celebrated or, more often, a loss to be bemoaned, in globalization’s contribution to the democratic deficit. In part, I argue that neither the process nor the phenomenon is new. But there is also a loss of both the globe and location within the globalization narrative, both inside and outside the discipline, despite counter-references to the local as the other side of the globalization coin. Ironically, much postcolonial globalization theory, with its critique of meta-narrative, often misses the local in its own meta-narrative—as in the case of Homi K. Bhabha’s powerful study of minority rights in the post-colonial era, The Location of Culture, a study which, despite its title, is ultimately bereft of location.11

The final section, “Westphalia without the West,” takes on the recent narrative of the demise of the nation-state. Scholars have been debating how much the state is truly in decline and how rapidly the state is losing or has lost its exclusive claim as the subject of international law. I will argue that the Westphalian system never quite existed in its now-imagined form and that even in the birthplace of the nation-state, Western Europe, the nation-state was at best very halting in coming to fruition, and that the international system was always populated by a variety of liminal jurisdictions, hybrid territories, and non-state powers. As that section argues, even the most positivist international legal theorists spent time on the variations from the nation-state norm.

This article as a whole, then, argues that international legal writers should pay much more attention to geography generally, and to historically and culturally concrete geography specifically. I would hardly suggest that no one is paying attention to the concrete and the local in their analysis of the international legal framework. Nevertheless, far too often the concrete and the local are lost in a broadly international and temporally oriented purview, and when attention is purportedly focused on the local, it too often loses its local specificity in the broader disciplinary lens of the dominant categories of discourse.

11 See generally Homi K. Bhabha, The Location of Culture (Routledge 1994).
II. REGIONALISM WITHOUT THE REGION

A. Álvarez’s American International Law

In his study of regionalism, *Der Internationale Regionalismus*, Winfried Lang announces that “regionalism as a manifestation of international politics is a contemporary invention,” explaining that the creation of a global system was a prerequisite for the creation of regionalism. And then in a set-piece discussion, Lang spends pages talking about the regional versus universal debates surrounding the creation of the League of Nations and the UN, setting out the tensions among Articles 51, 53, and 54 of the UN Charter. But rather than following those traditional paces, I would like to turn instead to some of the major proponents of the regional role in international law, starting with Alejandro Álvarez, the Chilean international lawyer who ultimately served on the International Court of Justice, and his early writing on “American international law.”

As Arnulf Becker Lorca tells us, Álvarez did not coin the term “American international law,” but that he was clearly its major proponent, taking up the debate with Latin American “universalist” interlocutors over the decades, pressing regional specificity against those who denied the legitimacy of all regional variation. Álvarez produced a steady stream of books and articles proclaiming the importance of “American international law,” oscillating in the role that he gave to the US as part of the “continental” system, but always focusing primarily on Latin America. In that vein, one of his rehearsals for *Le Droit International Américain*, published as an article in an early issue of the American Journal of International Law, was entitled *Latin America and International Law*. For Álvarez, “American international law” represented the progressive, leading edge of international law even though some of its principles were deemed untranslatable for Europe as “sui generis” concerns of the Western hemisphere, such as the Monroe Doctrine.

Álvarez was fond of creating lists, particularly lists of the American contributions to international law, and perhaps *Le Droit International Américain* provides the longest of these lists when it sets out ten of the international legal

---


principles that represented the special American "contributions" to international law. Álvarez fleshes them out over six pages, and some of those contributions in turn split like cells into long sublists. For example, the third contribution incorporates quite a number of liberties and freedoms, including the liberty of the seas, freedom of commerce, the abolition of the slave trade, respect for a range of individual rights, including freedom of belief, and concludes with several rights of neutrals in time of war. Álvarez tells us that the rights of neutrals adopted in the American hemisphere in 1848 would in turn be incorporated by the Europeans with the signing of the Treaty of Paris in 1856.

Clearly, Álvarez intends his readers to appreciate the prominent Latin American role in the progressive evolution of international law. Nevertheless, there are items on his list that were not yet adopted by the general international legal community and where, for Álvarez, Latin American states took vanguard positions. But Álvarez's international legal principles are, ultimately, rather familiar to the progressive French international legal circles in which he traveled. Even though Álvarez published in Paris with the main press of the solidarist international legal scholars under the name "Alexandre Alvarez," the special regional international law he promoted was mostly standard fare for the progressive European international lawyer. While his various books and articles identified a special, regional "American international law," his agenda was ultimately to establish the Latin American role at the progressive center of international legal development.

Álvarez's article in the American Journal of International Law contains many of the same passages as Le Droit International Amérifain. But both the emphasis and the audience were different. As its title, Latin America and International Law, suggests, Álvarez highlights the distinctions between Latin American and Anglo-American developments. Indeed, Álvarez tells his US audience that the differences in literature, commerce, capital, and population "caused between the two a separation so marked that they came to know each other only through the intermedium of European literature." Álvarez talks of the swing from the pure Monroe Doctrine to "imperialism" in his French text,
but in his English language article, he wrote more explicitly about the Latin Americans' feelings of "dread" and "distrust" of the US, whether or not they were "fomented by the press and literature of Europe[,] which represents the United States as preparing to absorb all America." In his introduction to the centennial volume of essays on the Monroe Doctrine that he edited at the bidding of James Brown Scott for the Carnegie Endowment for International Peace, Álvarez underscores the Monroe Doctrine as a "political standard" beyond its role as a "juristic principle." This proud practitioner of the French-inspired sociological-historical mode of the international legal discipline was speaking to a US readership raised on a classicist distinction between law and politics. This, I think, was part of his strategy of translation. But to return to his article of 1909, the substantive law reflected in the Latin American contribution was hardly alien to the American Journal of International Law readership. Álvarez was able to move from warnings about hegemonic excesses to consensus on international legal principles. Despite all the sections he devoted to the particular Latin American developments in Le Droit International Américain and the demarcations he made between Latin America and the US in his American Journal of International Law article, he was speaking to an audience that shared his international legal values. As much as he tried to emphasize regional distinctiveness, that distinctiveness melted away.

B. Elias's African International Law

Nigerian international lawyer Taslim Olawale Elias shared Álvarez's experience as a lawyer who had received advanced training at the metropole and spent much of his professional life there, culminating with a seat on the International Court of Justice. In essence, Elias and Álvarez shared a career path that encompassed both metropole and periphery. Elias was a lawyer with several advanced degrees from London schools, who taught both in London and Manchester; as such, he occupied a mediating position between the European metropole and his native Nigeria, and his work is charged with the effects of this liminal position.

There are dramatic changes in Elias's liminality over the course of his lifetime. His early works were written under the last stages of colonial rule and attempted to justify the compatibility of the Nigerian and English legal

24 But see Skouteris, The Notion of Progress at 75 (cited in note 5) (offering Álvarez as an example of an advocate for regional exceptionalism).
systems—particularly his mid-1950s study on the working of the dual English and customary law system in Nigeria, *Groundwork of Nigerian Law.*[^25] He wanted to convince an English legal audience that West African customary law worked well alongside a system of English common law and that the dual legal system maintained safeguards to expunge anything that, according to the standard British colonial legal formulation, was "repugnant to equity, justice and good conscience."[^26] Elias also felt the need to defend the customary law system within Nigeria, worrying about the population of newly trained Nigerian lawyers whose "English legal training tends to breed in them a sneaking contempt for the indigenous laws whose practitioners have not studied them formally in a Law School."[^27]

By the time Elias collected a series of his important essays and articles from the mid-1960s to the early 1970s in *Africa and the Development of International Law,* he had new goals and targets.[^28] Even among these essays and articles, his posture and his agenda shifted. His articles from the mid-1960s, *Commission of Mediation, Conciliation and Arbitration of the Organization of African Unity*[^29] and *Charter of the Organization of African Unity*[^30] were clearly open exercises in legitimization for newly born regional institutions in the two main organs of the Anglo-American international legal profession.

By comparison, in two of the chapters from the early 1970s, "The New States and the United Nations"[^31] and "Modern International Law,"[^32] Elias announces significant changes that had taken place in the international legal system rather than exploring regional international regimes. These changes were effected by the work of the International Law Commission, the UN General Assembly, other institutions, and international legal writing. For example, Elias describes a view that "the General Assembly of the United Nations through a process of *de facto* amendment of the Charter, aided and abetted by the hyperteleological interpretation of that document by the International Court of

[^26]: Id at 5.
[^27]: Id at 365. Mischievously, he observed that "It is curious that those who now proudly don the traditional costumes in and outside Nigeria as an outward expression of the renaissance of their feelings should make such light of this bedrock of their culture and be so anxious to get rid of their traditional laws which are neither barbarous nor otherwise unsuitable in their social context." Id at 364.
[^29]: Id at 121-47.
[^32]: Id at 63-87.
Justice, has now succeeded in achieving at least equality of status with the Security Council.\textsuperscript{33} It seems that despite the clamor for amending the Charter, which Elias notes, international institutional law has been altered largely by the pressure of the new states and the responsiveness of certain UN organs to their needs.\textsuperscript{34} The title of Elias's book, \textit{Africa and the Development of International Law}, clearly implies a special African role in the advance of international law, and his two essays on “The New States and the United Nations” and “Modern International Law” appear in the part of Elias’s book that is meant to deal with “certain general but fundamental questions of Africa’s contribution to the development of international law.”\textsuperscript{35} Nevertheless, in those two chapters, Africa’s role has been subsumed in the broader discussion of the effect of new states generally, including those not only of Africa but also of Asia and Latin America.\textsuperscript{36}

In examining Elias’s liminal position as an African lawyer bridging Africa and the metropole, Liliana Obregón’s study of European-educated Latin American international lawyers also occupying a similar liminal space is instructive.\textsuperscript{37} Obregón has provided an extremely important analysis of the “criollo consciousness” of Latin American international lawyers with Spanish forebears, like Álvarez, who were caught in an ambivalent position between the metropole and their native countries with their indigenous populations. By contrast, the highly educated West African elite of Elias’s generation was distinguished from those of other regions by its own specific history and cultural content; the members of this elite grew up under colonial rule and did not identify, as Obregón’s criollo did, with the bloodline and cultural heritage of the metropole. Philip Zachernuk has carefully traced the shifting identities and identifications of Nigeria’s educated elite, starting with the mid-nineteenth-

\textsuperscript{33} Id at 54.
\textsuperscript{34} Id at v (Elias argued that one of the two primary factors for the changes in international law that occurred in the decades following World War II was “the emergence as sovereign independent States of former colonial dependencies” of European countries. “The work of the United Nations and, consequently, the development of international law have in large measure been influenced by the enlarged membership [in the UN] resulting from the accession of these [newly independent] African States with the collaboration of their Asian and Latin American counterparts.”).
\textsuperscript{35} Elias, \textit{Africa} at v (cited in note 28).
\textsuperscript{36} Without question, there was heightened African interest in the series of South-West Africa cases that Elias describes in his chapter on “The World Court and Africa,” in \textit{Africa} at 88–106 (cited in note 28), but this does not alter the fact that his explanation for the major changes in international law were not specifically African in content.
century “black Englishmen” and proceeding through a series of oscillations between joining Americans in a single “Black Atlantic” voice, advocating négritude or the “African personality,” or adopting a nationalism or loyalty to territory.\(^{38}\)

If the liminality of a Nigerian lawyer in Elias’s position was historically different from that of the Latin American lawyer described by Obregón, Elias had his own path towards what I discern in Álvarez, subsuming the specific character of his native continent into a broader picture. Despite the large African presence among the newly independent states, Elias’s treatment of the states arising from the process of decolonization ultimately focuses on their shared rather than their distinct historical experience. In so doing, he depicts African states as not charged by their uniquely African experience.

C. Singh’s Indian International Law

In 1969, the Indian international lawyer Nagendra Singh—at the time Vice President of India and who, like Álvarez and Elias, would also subsequently be appointed to the International Court of Justice—came out with a book entitled *India and International Law*.\(^{39}\) Although the book does not focus on a region, it focuses on the large landmass that is India. Singh concentrates on the international legal principles that can be found in ancient and pre-modern Indian texts and practices. Through this survey, Singh finds in Indian law precursors to much of modern international law. He aims to show the consistency between ancient Indian international law and contemporary international law, and thus uses modern terms to describe similar Indian practices to emphasize the similarity of the two legal systems. In that spirit, he would use section titles to emphasize the pioneering role of early Indian law, such as “The Existence of the Concept of Rebus Sic Stantibus.” That section appears in his long discussion of the principles found in Kautilya’s *Arthasastra*, the fourth-century BC Sanskrit text of statecraft and public administration only discovered at the beginning of the twentieth century. In describing a state’s right to repudiate a treaty under the *Arthasastra*, Singh observes, “[t]his could possibly be interpreted as the existence of rebus sic stantibus clause in its very rudimentary form.”\(^{40}\)

---


40 Id at 60.
Parsing through Sanskrit terminology and Indian concepts, Singh—much like Álvarez and Elias—is working toward an explicit discussion of India’s contribution to international law. “What appears necessary here,” he asserts, “is to bring out the Indian contribution to the vital aspects of the law as well as towards the solution of the basic issues and problems faced by the sovereign states and humanity at large in the context of the world community of states and peoples.” Indeed, he continues, “[i]n that context, it may perhaps be worthwhile to examine the Indian attitude towards eradication of war and promotion of world peace.”

Basically, in a move similar to Álvarez and Elias’s advocacy for the contribution of their native continents to modern international law, Singh similarly marshals texts and practices to establish India’s contribution. The texts and terminology, such as “the legal dictum upanyantra nashetu tato vigrhamacharet” and “the Buddhist law of dhamma aaya” could hardly be more alien to the ears of Western international lawyers, but the concepts—we are assured—are thoroughly familiar.

D. Okafor’s African Human Rights System

In much the same vein, another Nigerian-born scholar, Obiora Chinedu Okafor, has recently written on the African system for protecting human rights. Okafor develops his own approach to understanding the ways in which the various institutions of the African human rights system make an impact. Essentially, he is working against a background in which “[t]he virtual consensus in both the mainstream and non-mainstream literature is that the African system (and each of its component entities) is ‘weak’ and ‘ineffectual.’” To support this point, he begins by stating that “Henry Steiner and Phillip Alston, two of the most important international human rights scholars, captured the prevailing sentiment in the literature when they declared boldly that ‘the newest, the least developed or effective . . . the most controversial of the three established regional human rights regimes involve African states.’”

Okafor, whose own brother is an opposition politician in Nigeria, understands well the challenges to the enforcement of decisions by the African human rights system. But he is able to identify a sort of echo chamber between

---

41 Id 69–70.
43 Id at 67.
the human rights institutions and non-governmental activists on the ground in Nigeria and other countries. Thus, in a chapter called the “Impact of the African System within Nigeria,” he asserts that “observed through this more holistic optic, the African system appears to have exerted a modest yet significant level of influence within at least one African state—Nigeria.”45 Moreover, in his Nigerian chapter, Okafor states that for all the examples in the chapter, “local activist forces played an important role in deploying the African system’s norms or processes to help produce the desired outcomes.”46 Of course, this indirect process is effective mostly at the edges—the Abacha military government could not be averted from executing Ken Saro-Wiwa despite the African Human Rights Commission’s speaking out against the execution.47 Nevertheless, Okafor is able to produce a series of case studies showing how certain courts or other governmental bodies in Nigeria and elsewhere have been influenced by the indirect process at the heart of his book. Still, despite the fact that Okafor is identifying a specific dynamic in certain African countries, the dynamic need not be seen as exclusively African. Indeed, Okafor writes in his conclusion that:

[It is only fair to suggest that the book also shows, much in line with Balakrishnan Rajagopal’s germinal work on international law and social movements, that scholars must take the work of domestic actors (such as those formed by [civil society actors] and other activist forces) much more seriously even when attempting to account for the effectiveness of the [international human rights institutions] themselves.]48

Okafor highlights the African case as an example of the effective synergy of NGOs and human rights institutions. In the end, there is no special African content or emphasis in the particular human rights at stake or the path towards addressing them in Okafor’s book.

E. Regionalism, the UN, and Fragmentation

Okafor’s publication provides a bridge to regionalism, specifically the use of regional bodies, as a technique for deciding and enforcing international law more efficiently. Indeed, the collection of articles published for the UN Institute for Training and Research in 1979, Regionalism and the United Nations, is almost entirely focused on regional institutions—both institutions created regionally.

45 Id at 93.
47 See id.
and regional bodies of the UN—in their role as technique. As its title suggests, the opening article by the former Secretary General of the Council of Europe, Sir Peter Smithers, *Towards Greater Coherence among Intergovernmental Organizations through Government Control*, is about improving regional organizations as technique. Among other things, Smithers worries about the "inappropriate geographical composition of the United Nations regional bodies in relation to the tasks which it was hoped they would perform," the complexity of international organizations that create a "layer of concealment," and even budgetary concerns. In Smithers's study, regional bodies seem to have no reference to the specific character of their regions. Only with Berhanykun Andemicael's own essay *The Organization of African Unity* is there a sense of particularly African stakes in his discussion of "liberation diplomacy," but even then we discern the centrality of the UN as a platform. As he explains,

> In 1960, the impact of the membership of African States in the United Nations on the scale of values of the United Nations began to be felt when the newly independent African States were joined by some other [s]tates in articulating their special concerns and their demands on the international community.

In a sense, this represents a reversal of Elias and Álvarez, who described regional conceptions in broader terms rather than restating broader international principles in regional terms.

Discussions of regionalism and regional institutions now often appear as a species in the larger genus of fragmentation, which the UN International Law Commission, led by Martti Koskenniemi, defines as the tendency of international bodies to "develop in a number of historical, functional, and regional groups which are separate from each other;" leading to "the emergence of specialized and relatively autonomous spheres of social action and structure." Koskenniemi and his working group's main effort is to stay the
exaggerated fears of the over powering fragmentation of international law, and he
does so by stating that fragmentation is nothing new and there has always been a
series of methodologies for working through potentially conflicting legal
systems.54 When Koskenniemi discusses regionalism as a variant of
fragmentation, he divides it into three different approaches: (1) “as a set of
approaches and methods for examining international law,” (2) “as a technique
for international law-making,” and (3) “as the pursuit of geographical exceptions
to universal law rules.”55 But, as I mentioned, regionalism makes a cameo
appearance as simply one example of the more general phenomenon of
fragmentation in international law, so much so that Koskenniemi states:
“Instead of illustrating the independently normative power of regional linkages,
these cases come under the discussion of *lex specialis* above.”56 The Koskenniemi
study is another case of regionalism being emptied of real, local regional content.
In a sense, this is the obverse of Anne-Charlotte Martineau’s claim that
“international lawyers view law as leading from political chaos to legal unity
while refusing to engage in discussing the substance of that unity . . .”57 Instead,
international lawyers avoid, even in their celebration of regions and regionalism,
engaging the specific.

III. GLOBALIZATION WITHOUT THE GLOBE

A. Narrativizing Globalization

Leslie Sklair opens his essay in *The Postcolonial and the Global* with the
unremarkable pronouncement that, “[r]emarkably for a subdiscipline in the
social sciences, theory and research on globalization appears to have reached a
mature phase in terms of volume of publications if not their quality.”58 There is,
of course, an immense amount of debate over the definition as well as the stakes
of globalization. One of Germany’s leading writers on globalization, Ulrich
Beck, calls it the most “used” and “misused,” “least defined,” and “nebulous” of
terms.59 And in Alfonso de Julios-Campuzano’s editor-introduction to *Ciudadania*

---

54 See id at 486 (“Because of the spontaneous, decentralized, and unhierarchical nature of
international law-making...lawyers have always had to deal with heterogeneous materials at
different levels of generality with different normative force.”).
55 Id at 199–217.
57 Anne-Charlotte Martineau, *The Rhetoric of Fragmentation: Fear and Faith in International Law*, 22
Leiden J Intl L 1, 8 (2009).
58 Leslie Sklair, *Discourses of Globalization: A Transnational Capitalist Class Analysis*, in Revathi
59 Ulrich Beck, *Was Ist Globalisierung* 42 (Suhrkamp 2007) (“Globalisierung ist sicher das am meisten
gebrauchte – missbrauchte – und am seltensten definierte, wahrscheinlich missverständlichste,
y Derecho en la Era de la Globalización, he warns that the theory of “globalization” represents a “simplification fusing the new multivalent reality into a single and unambiguous term that creates an erroneous sense of unity rather than a synergy of concurrent factors.”

The term has been variously defined by academics, but generally scholars use “globalization” to describe the increasing interconnectedness between distant parts of the globe. Anthony Giddens defines globalization as “the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa.” Susan Silbey adopts and adds to Gidden’s description. William Twining also quotes Giddens’s definition after asserting in his own words that:

“We are now living in a global neighbourhood, which is not yet a global village. In the present context the term ‘globalisation’ refers to those processes which tend to create and consolidate a unified world economy, a single ecological system, and a complex network of communications that covers the whole globe, even if it does not penetrate to every part of it.

Except for a few skeptics who assert that globalization is just a new name for an older phenomenon, most scholars writing on globalization consider it to be a recent and major transformation in our social, economic, and cultural life—or at the very least as an acute “heightening” or “intensification” of existing trends or processes. Ulrich Beck believes that globalization is so transformative that he refers to “Globisierungsschock.” Regardless of whether globalization is a unique phenomenon or a new incarnation of an older pattern, we are experiencing something dramatic and certainly worth the increasing numbers of Globalization Readers, Dictionnaires de la mondialisation, and Lehrbücher der Globalisierung. Even where globalization is viewed as just a heightening or intensification of an age-old process, scholars acknowledge that the lived experience of an average person is dramatically different than in earlier periods.

---

60 Alfonso de Julios-Campuzano, ed., Ciudadania y Derecho en la Era de la Globalización 9 (Dykinson 2007) (“[U]na simplificación agrupar todas esa polimórfica realidad en un término unívoco y singular que transmite una errónea idea de unicidad y no de la sinergia de una multiplicidad de factores concurrentes . . .”).


63 William Twining, Globalisation and Legal Theory 4 (Buttersworth 2000).

64 Beck, Globalisierung at 33 (cited in note 59).
of increasing global interconnectedness, and further acknowledge that the acceleration of connections is itself giddy.

As I argue in this section, globalization studies, both inside and outside the international legal discipline, take on a narrative mode—that is, they focus more on the “ization” than the “global.” That is why so many authors focus on the “process” and lose sight of the culturally and geographically specific.\(^6\) Moreover, there is something familiar in many of the narratives offered about globalization—in both the phenomena described and the experience of its newness. In fact, the narratives of the globalization process take their tropes from a storehouse of set pieces about apocalypse, cultural decline, and liberation. This “new new thing” is actually an old, old story. They ultimately emphasize the temporal over the spatial—the familiar narrative over real places.

B. Narratives of Redemption and Declension

There are scholars who present globalization as ameliorative in nature or, more often, as offering a promise of redemption. Among them are scholars who see in globalization the promise of global civil society, as Richard Falk did when he announced the “infancy of a global civil society.”\(^6\)\(^6\) Similarly, Gabriela Rodriguez envisions an “emergence of the transnational civil society” along with the decline of the importance of sovereign, independent state powers in the final decades of the twentieth century.\(^6\)\(^7\) Global civil society, then, stands as a redemptive answer to the problems of the present. In *Globalization: A Critical Introduction*, Jan Aart Scholte is cautious about the few optimistic currents in his narrative, venturing to describe the negative impact of globalization but noting that not all of globalization inherently leads to dire results. He thus ends his chapter “Globalization and (In)Justice” by modestly asserting that “neo-liberalism is not the only policy approach available to our globalizing world” after establishing the intensification of “class stratification” and “country stratification” that has resulted from the current path of globalization.\(^6\)\(^8\) And his chapter, “Globalization and (Un)Democracy,” provides a conceptual tug of war between the promising inception of global civil society and the general failure of transparency and accountability in contemporary civic associations. In essence,


he provides for the possibility that “civil society activities can contribute to a
democratic legitimation of the governance of globalization.”

Susan Silbey similarly ends her essay, *Globalization, Postmodern Colonialism,
and Possibilities of Justice*, with a turn to the “possibilities of justice” as a
redemptive gesture following a devastating critique of the impact of
globalization. For her, “the dominant narratives of globalization make questions
and claims of justice less possible by masking the operation of power through
invisible hands and inevitable change,” so she calls for a “sociology of
globalization.” In essence, a sociological inquiry creates the promise of social
justice.

One of the strongest redemptive narratives can be found in Boaventura de
Sousa Santos’s *Toward a New Legal Common Sense*, which ends with a chapter
called, “Can Law be Emancipatory?” Clearly, he suggests in this very title the
possibility of emancipation, yet it comes after his discussion of the “demise of
the social contract and the rise of social fascism” with its “stratified civil
society.” Only then can he turn to his discussion of subaltern cosmopolitanism
to tell the story of “counter-hegemonic globalization.” There he describes
subaltern cosmopolitanism as “a cultural, political and social project of which
there are only embryonic manifestations.” For that reason, he argues, “an
inquiry into the place of law in subaltern cosmopolitanism and the nascent
practices that may embody subaltern cosmopolitan legality must be done in a
rather prospective and prescriptive spirit.” De Sousa Santos identifies this as
the animating force of his chapter and describes “a research agenda on subaltern
cosmopolitan legal theory and practice and at mapping some of the key sites in
which such theory and practice are currently being tried out.” De Sousa Santos
concludes that “under the logic of the sociology of emergence this subaltern
cosmopolitan legality is as yet but in the bud; it is, above all, an aspiration and a
project.” It is, then, this “sociology of emergence” that promises redemption
for de Sousa Santos just as the “sociology of globalization” does for Silbey.

The redemptive side of the narratives I have just described reflects mostly
the slight glimmer of hope seen through the overpowering damage wrought by
globalization. For de Sousa Santos, we are experiencing “the increasing fragmentation of society, divided into many apartheids, polarized along economic, social, political, and cultural axes.” Susan Silbey describes globalization “as a form of postmodern colonialism where the worldwide distribution and consumption of cultural products removed from the contexts of their production and interpretation is organized through legal devices to constitute a form of domination.” She explains that in postmodern colonialism, “control of land or political organization or nation-states is less important than power over consciousness and consumption, which are much more efficient forms of domination.” In her view, the irony is that, “[a]lthough the last several centuries of European imperialism have been transformed in this century by successful liberation movements, it seems that we are witnessing a new form of domination that may be more insidious and difficult to dislodge.” But these Foucauldian nightmares are set for most of these scholars in the explosion of mass cultural products, expanding financial markets, and a narrowing of space—that is, the critical globalization narrative.

C. The Narrative of Novelty

Scholars of globalization diverge over whether globalization is a new phenomenon or just a powerful, new manifestation of an older structure. Advocates of the more widely held view that globalization is both new and unique include Scholte, who recognizes a range of the defining characteristics of globalization including internationalization, liberalization, universalization, and westernization. Scholte is struck by globalization’s radical deterritorialization and elimination of distance. For him, “globality in the sense of transworld simultaneity and instantaneity—in the sense of a single world space—refers to something distinctive that other vocabulary does not cover.” Similarly, Leslie Sklair argues that globalization is the result of three relatively recent developments in modern history:

First, technological and organizational changes in transnational corporations (TNCs) have facilitated the globalization of capital and the production of goods and services on a historically unprecedented scale. . . . Second, the rise of new transnational forms of organization of the capitalist class has transformed the ways in which capitalism organizes itself politically in the global arena. Third, the electronic revolution and accompanying

---

77 Id at 447.
79 Id at 265.
80 See Scholte, Globalization at 15–16 (cited in note 68).
81 Id at 49.
technological and regulatory transformations in the global scope of TNCs... have made possible the emergence of a global culture-ideology of consumerism, based on the promotion of global-brand consumer goods and services.  

Leslie Sklair uses the formulation "on a historically unprecedented scale" to reflect the general sense of dramatic change. In their own version of the changes represented by globalization, Richard Warren Perry and Bill Maurer explain that "[t]oday's new world orders, even as they rest on sedimented configurations of spatial difference inherited from the ethnoracial and colonial/imperial systems of the past, are constructed of novel regimes of spatial and temporal segregation, innovations of enclosure and exclusion." 83

But this narrative of novelty is not undisputed. Susan Silbey argues that globalization is just a new technique in the service of an older hegemony, essentially a new form of domination. Similarly, others argue that globalization represents an acceleration or intensification of processes that were at work long before the "beginning" of globalization. As Ruth Buchanan and Sundhya Pahuja explain in Law, Nation, and (Imagined) International Communities, "in the shift to the international triggered by globalization, this basic architecture [of hierarchy] has not altered, but intensified." 84 In the words of Susan Silbey, "[l]ike new Tide®, globalization is an updated, smartly packaged, reengineered version of an old product." 85 In essence, globalization is little more than rebranding old power structures.

The debate described above is between those who see globalization as a process of overwhelming change and those who see globalization as a change only in the method of the application of power. I would suggest, however, that it is instructive to turn to the historical study of globalization. Although Scholte provides a brief prehistory of globalization with a suggestion of an early "global imagination" leading into the eighteenth century, and an "incipient globalization" from the 1850s to the 1950s, before he sees the emergence of a "full-scale globalization," 86 there are important studies of earlier globalizations or earlier stages of our contemporary globalization. Thus, for example, Harold James has written the story of an earlier rise and decline of a globalized financial

85 Silbey, "Let Them Eat Cake" at 258 (cited in note 61).
Regionalism, Geography, and International Legal Imagination

system in *The End of Globalization*, which described a cycle ending with the Great Depression of the 1930s.87 Kevin O'Rourke and Jeffrey Williamson, in *Globalization and History*, take a broader view than James, looking not only at capital flows and trade but also at migration (including migration policy) in the Atlantic economy from 1830 to 1940, including a “globalization backlash” story.88 Régis Bénichi in *Histoire de la Mondialisation* briefly mentions the medieval global spice market and the sixteenth-century trade in precious metals before starting his story in the nineteenth century.89 Similarly, Suzanne Berger provides an essentially late nineteenth and early twentieth century story in her book on “our first globalization.”90 Although one might suspect the influence of a publishing house sales department on the insertion of “mondialisation” in titles of books on late medieval and early modern subjects, it is appropriate to date globalization much earlier than the nineteenth century. Serge Gruzinski’s publishers may have had a hand in the subtitle of his *Les Quatre Parties du Monde: Histoire d’une Mondialisation*, but globalization is truly at the center of his story of the Spanish and Portuguese empires of the late sixteenth and early seventeenth centuries with their reach to South America and the African coast as well as to Goa and the Philippines.91

Jan Aart Scholte basically downplays these early globalizations:

True, entrepreneurs sold coffee between and across continents as early as the thirteenth century, and transoceanic trade in tea, cocoa, cane sugar, precious metals, spices, tobacco and furs followed several hundred years later. However, this commerce involved only a few articles, traded in relatively small quantities, by a handful of companies, for a tiny minority of the world’s population.92

But Scholte’s comment about “only a few articles” ignores the massive movement of people in the centuries of slave trade and the slave trade’s enormous impact on the culture and economy of West Africa, the intercontinental spread of disease, the cross-importation of fruits and vegetables that radically changed diets and ways of life, and the dramatic inflationary effects of the trade in precious metals. Even supposedly luxury items—Scholte’s “only a

92 Scholte, *Globalization* at 65 (cited in note 68).
few articles”—made their cultural and economic imprint as shown, for example, by Marcy Norton’s study of the tobacco and chocolate trade in the Atlantic world.\(^9\) Norton’s story is one of cultural “syncrétisme” and one in which “Europeans did not welcome tobacco and chocolate in spite of the meanings that Indians attributed to them, but often because of them.”\(^9\)

Recreating the trajectories of tobacco and chocolate over the course of two centuries leads to many corners of the early modern Atlantic world, places where one finds determined and frightened soldiers, zealous missionaries, resourceful plantation slaves, defiant Mesoamerican nobles, adaptive Indian commoners, mestiza love sorceresses, unsubjugated Carib Indians, cosmopolitan European humanists, crypto-Jewish Portuguese traders, lofty Sevillan merchants, worldly clergymen, scappy sailors, reforming financial ministers, the patrons of smoky taverns, and the guests of well-appointed noble mansions.\(^9\)

In essence, the impact of the transit of these two commodities had broad reach. But even the advent of the Internet, which has initiated the most profoundly “new” experience of the collapsing of space, only repeats the nineteenth-century experience of the emergence of the telegraph. In The Victorian Internet, Tom Standage describes this earlier experience of an incredibly shrinking globe with stories that echo modern stories about Internet communication.\(^9\) The stories he tells about the Victorian experience of the telegraph have been replicated in the last two decades of Internet communication. For example, both revolutions in communication led to instances of gender confusion.\(^9\) There was, Standage tells us, even a need to draft a new law in the UK as a result of a telegraph operator who was bribed to delay the results of a horse race.\(^9\) We are barraged today with hyperbolic

---


\(^9\) Id at 106–08, 120–21.
pronouncements about the novelty of instantaneous communication, but the experience of that novelty is itself hardly novel.

Not only might we recognize that the sensation of globalization and the phenomenon of globalization as a recurring story, but we should recognize as well that it does not need to be truly global. Rather, the territorial reach of "globalization" can be found in historical cases such as the movement and commerce in the Mediterranean world of the sixteenth century, described in such detail by Fernand Braudel. As he wrote in the third volume of *Civilization and Capitalism*, "The Mediterranean region, although divided politically, culturally and indeed socially, can effectively be said to have had a certain economic unity, one imposed upon it from above on the initiative of the dominant cities of northern Italy, Venice foremost among them, but also Milan, Genoa and Florence." He describes activities "that ignored the frontiers of empires." Indeed, the trade ignored the political dividing line between Islamic and Christian polities running north-south between the Levant and the western Mediterranean—"[a]ll the great battles between Christians and Infidels were fought on this line. But merchant vessels sailed across it every day." And, although China plays a minor role in Braudel's mostly European story, he explores the global impact of local decisions when he talks of the change in China's role in the world economy triggered by the Ming relocation of the capital to land-locked Beijing in 1421, and the subsequent shift away from its previously sea-based trade. Similarly, K.N. Chaudhuri, deeply influenced by Braudel, writes of "a common geographical space" of the Indian Ocean stretching from the East African Coast to Indonesia in *Trade and Civilisation in the Indian Ocean*, and E.W. Bovill describes the centuries of intense cross-Saharan trade activity that kept the southern Mediterranean in contact with the great medieval African empires. Another part of the story is represented by all of those centers of confluence among cultures, such as María Rosa Menocal's


100 Id.

101 Id at 22.

102 Id at 32.


medieval Spain with its distant connections, or the Ottoman Empire and its capital city.¹⁰⁵

These scholars demonstrate the importance of considering the intricacies of geography in globalizing experiences. Globalization, argues John Tomlinson in Globalization and Culture, turns on the perception of globalization. Summarizing Roland Robertson, he observes that “the structures of global connectivity combine with a pervasive awareness of this situation to raise any local events inevitably to the horizon of a single world.”¹⁰⁶ That is, globalization is marked by the awareness of global interconnectedness, by the experience of “deterriorialization.”

In order, however, to have an awareness of “deterriorialization,” territorialization is required. Tomlinson talks of “stubbornly enduring physical distance,”¹⁰⁷ but perhaps more profound are the other cultural and social differences that need to be embedded in the experience of convergence. Without the exoticism of the foreign, there would be little sense of movement to a single global space. Globalization, in the end, may require a never completely submerged hybridization¹⁰⁸—and this may be behind the phenomenon of “translations without originals,” translations of totally fictional original texts, described by Emily Apter in The Translation Zone.¹⁰⁹ The “other” is so much part of deterriorialization that the “other” may even need to be invented. In the end, deterriorialization is impossible without territory and its specificity. But in addition to the specificity needed as the reverse side of deterriorialization, I have been pressing the need to highlight the cultural experience of the geographically specific.


¹⁰⁸ Indeed, Marwan Kraidy has asserted that hybridity “is not just amenable to globalization. It is the cultural logic of globalization.” Marwan M. Kraidy, Hybridity: Or the Cultural Logic of Globalization 148 (Temple 2005).

IV. WESTPHALIA WITHOUT THE WEST

A. State of Decline

The central story of globalization—particularly for international legal scholars—often depicts the demise of the state and the collapse of sovereign territoriality. In this section, I turn to the debate over the faltering state and the disintegration of a Westphalian state system as the centerpiece of the international order. I argue that not only did the Treaty of Westphalia fail to create the Westphalian system, but also that, if the system so central to international legal discourse ever existed, it did so only briefly. Even international legal theorists, writing at the height of the nineteenth and early twentieth century positivist articulation of state sovereignty, labored over the taxonomy of sovereign states. Similarly, I argue that the critical role given to non-state actors was hardly the invention of the final decades of the twentieth century. If the trope of the Westphalian state system identifies the nation-state as critical to the modern international system, it is, of course, well known how poorly the “nation-state” model fits those states that were created along arbitrary colonial boundaries. I argue further, however, that even in Western Europe, the supposed epicenter of the nation-state ideology, the nation-state was never quite as strong an imagined community as many have assumed. In essence, I agree with anthropologist Akhil Gupta’s observation that “the nation is so deeply implicated in the texture of everyday life and so thoroughly presupposed in the academic discourses on ‘culture’ and ‘society’ that it becomes difficult to remember that it is only one, relatively recent, historically contingent form in organizing space in the world.”

Rehearsing the standard legal globalization arguments at the start of his book on law and globalization, Adam Gearey asserts, “Global law exists ‘without the state,’ no longer relying on the old logic of sovereignty.” Instead, a sort of

110 I will mostly focus on international legal writers, but similarly, international relations writer James Rosenau asks, “what kinds of new social contracts are likely to evolve under epochal conditions that can no longer sustain those that developed out of the Treaty of Westphalia and the American and French Revolution centuries ago?” James N. Rosenau, Distant Proximities: Dynamics Beyond Globalization 300 (Princeton 2003).


“[I]ex mercatoria appears to develop without a sovereign state power.” Similarly, Gabriela Rodríguez states that the “traditional concept of sovereignty” is simply not “applicable to the global relations at the end of the twentieth century.” And Alfonso de Julios-Campuzano writes unambiguously of “the death of the state—la muerte del Estado” while Stefan Kaufmann writes of “imploding borders—implodierender Grenzen.” It has become standard fare both inside and outside the discipline of international law to pronounce on the loss of the state.

There are, of course, weak versions of the death-of-the-state pronouncements by scholars who discern the decline of the state without predicting its complete demise. For example, Leslie Sklair’s theory of “transnational globalization” describes the process of globalization as the development of practices, forces, and institutions that span across states, and work over them, without entirely supplanting them. He interchangeably uses the terms “transnational” and “globalizing” to “signal that the state, or rather some state actors and agencies, do have a part to play in the globalization process, however diminished relative to their previous roles.” Similarly, Scholte argues that the organizational unit of the state will prevail through globalization, albeit in modified form. He states flatly that its “death notices have been recklessly premature.” But admitting the state’s survival “is not to say that globalization has left the state and governance unchanged.” As he explains, “Rather than contracting or eliminating the state, the spread of supraterritoriality has tended to create a different kind of state.”

Despite his hedged language, the five shifts that Scholte identifies are ultimately quite radical in nature: “(1) the end of sovereignty, (2) reorientation to serve supraterritorial as well as territorial interests, (3) downward pressures on public-sector welfare guarantees, (4) redefinition of the use of warfare, and (5) increased reliance on multilateral regulatory arrangements.”

113 Id.
114 Id. at 25 (cited in note 67) (“[E]l concepto de soberanía tradicional ya no es aplicable a las relaciones globales de finales del siglo XX . . . .”).
115 Id. at 9 (cited in note 60).
116 Id. at 132 (cited in note 68).
117 Id at 133.
118 Id at 135.
119 Id at 135.
120 Id at 133.
Saskia Sassen, one of the most sophisticated theorists on the fate of the state, blends the decline narrative with one about the instrumentality of the state within globalization. “Sovereignty and territory,” she argues, “remain key features of the international system.” Nevertheless, “they have been reconstituted and partly displaced onto other institutional arenas outside the state and outside the framework of nationalized territory.” Ultimately, “sovereignty has been decentered and territory partly denationalized.”

Sassen makes clear that while the state has been “a key agent in the implementation of global processes,” capital markets have captured certain state functions. “These markets now exercise the accountability functions associated with citizenship: they can vote governments’ economic policies down or in; they can force governments to take certain measures and not others.”

A variety of authors place the demise of the state in the context of both greater globalization and the localization of power. For example, Stefan Kaufmann describes the diminished state in the context of growing networks. So does James Rosenau, who argues in Distant Proximities that modern international law is dictated by the tension between “forces pressing for greater globalization and those inducing greater localization.” It is in this context that so many theorists find Hedley Bull’s notion of a “new mediaevalism”—where the current globalization resembles the medieval political blend of broad, overlapping geographically dispersed forces and smaller local units—appealing, and so we find it cited in Ulrich Beck’s Was Ist Globalisierung?, as well as in the final pages of Wolfgang Reinhard’s Geschichte des modernen Staates.

The other approach, represented by Ruth Buchanan and Sundhya Pahuja, leaves the state very much in place and repurposed for the goals of globalization. In fact, they warn about “perpetuat[ing] a belief in the demise of the nation-state,” and they tell us,

far from withering away, nation-states persist in their current form because they are reinforced as such by international institutions, both political and economic. But in the turn to international community as a new source of popular legitimacy in the context of globalization, the dependence of the current order on the continued existence and conceptual unassailability of the nation-state is obscured.

123 Id at 29, 42.
124 Rosenau, Distant Proximities at 4 (cited in note 110).
126 Buchanan and Pahuja, Law, Nation at 262 (cited in note 84).
127 Id.
Nevertheless, if their nation-state has not “withered away” and is only “concealed,” they share a confidence in the reign of a Westphalian past with the theorists of the declining and reconfigured state.

B. Westphalia and All That

One of the staples of introductory European history courses has been the significance of the Treaty of Westphalia and its enshrining the principle *cuius regio eius religio*, thereby ending the Thirty Years’ War on a settlement that gave each prince the power to determine the religion of his principality. Of course, historians understand that no fabled transformative event ever lives up to the fable, and all periodizations, like the Renaissance, rarely stand up to historical scrutiny. Indeed, the historian Robert Stacey has told me that he received letters of complaint because one of the sections he wrote for a major Western civilizations textbook did not give the Treaty of Westphalia its traditional, iconic status.128

Stéphane Beaulac has contributed to our understanding of the “myth of Westphalia.” In *The Power of Language and the Making of International Law*, he eliminates all hint of the *cuius regio eius religio* solution. If anything, the two treaties that made up the Treaty of Westphalia added new religious protections against the prince—“[a]lthough the *Treaties* did not explicitly abandon the principle that the monarch could determine the religion of the land, they nevertheless provided for some constitutional safeguards.”129 Moreover, he tells us that the treaties’ granting of treaty-making powers to the princes has also been exaggerated because both of the treaties that make up the Treaty of Westphalia, that is, both the Treaty of Münster and the Osnabrück Treaty, explicitly prohibit any alliance made by a prince from being forged against the *imperium*, and the Osnabrück Treaty “confirmed to the Imperial Diet all other powers usually linked with the exercise of supreme authority over a territory—for example, legislation, warfare, taxation.”130 Beaulac goes on to provide a close examination of Bodin and Vattel’s theories of sovereignty, but he situates their writings in their immediate political frame, so that in addition to the refined points he makes about their working through issues of internal and external sovereignty,

---

128 See Judith G. Coffin and Robert C. Stacey, *Western Civilizations: Vol. B: 1300–1815* 513 (Norton 16th ed 2008) (addressing the theory of Westphalia in only a few paragraphs that argues that while the Treaty “establish[ed] some abiding marks in European history,” its notable effect was the ascendency of France and decline of Spain as a regional hegemon—not the creation of the nation-state as the recognized actor in international law).


130 Id at 89.
he depicts them as ultimately more prescriptive than descriptive. In essence, these theories are theories of power rather than theories teaching us about the historical realities of power in play.

But what of the realities of power in the state system? To underscore the force of the “myth of Westphalia” as Beaulac does so convincingly, is not immediately to deny its impact because of the potentially formative role of myth. Nevertheless, if we consider the Westphalian system—the international order based on state actors—rather than the seventeenth century treaty, we find a very cloudy picture. There is nothing tidy about how sovereignty really worked. Beaulac has already provided us with a picture of the mixed imperial sovereignty of the Holy Roman Empire, and there is also a great deal of complexity in the sovereignty of the Ottoman Empire. The international order has always been a challenging taxonomy of various shared, delegated, and spliced powers. The strange recipe that is the current Special Administrative Region of Hong Kong is hardly a new phenomenon.

We are often told in the narrative of globalization that the nation-state is receding in favor of non-state actors. But the era of the Westphalian state system was replete with non-state actors acting internationally. One only has to think of the role of the British East India Company in India, no matter how entangled it was with the British government, or the Dutch East India Company. In his 1956 *Trade and Politics in the Niger Delta, 1830-1885*, K. Onwuka Dike provided a complicated picture of the various British trading constituencies in the Niger Delta and their differing forms of interaction, not only with various African political organizations, often created at their behest, but also with various levels of the British government both in London and in West Africa. As another early twentieth century example, Cyrus Veeser has told the story of the machinations of the American-based San Domingo Investment Company, which was a major creditor of the Dominican government and managed to arrange a payment schedule for the Dominican government’s debts through international arbitration. In this arbitration, the company’s attorney, John Bassett Moore, also represented the State Department and steered the arbitration panel. We can add to this the numerous Western missionary organizations, the cross-border activities of the Jesuits, and the like.

It is hardly a new phenomenon for what we now call non-governmental organizations (NGOs) to involve themselves in international conferences. Elizabeth Borgwardt tells, for example, of the numerous “pressure groups” that

---

131 Id at 101–25, 128–83.


were invited to San Francisco by the US State Department to provide their input for the drafting of the UN Charter.\textsuperscript{134} In addition to the forty-two officially invited groups, a host of other groups sent delegates to San Francisco. William Korey describes the involvement of NGOs in the creation of the Universal Declaration of Human Rights.\textsuperscript{135} The International Red Cross was deeply involved in Versailles and, indeed, Article 25 of the League of Nations Covenant is devoted to the promotion of “duly authorized national Red Cross organizations.”

One of the common elements of the narrative of the decline of the nation-state is the privatization of government functions and, most notably, security and military functions. This is an increasing area of scholarship, including a series of essays edited by international lawyers Simon Chesterman and Chia Lehnardt with the subtitle, \textit{The Rise and Regulation of Private Military Companies}.\textsuperscript{136} There is a sense of the novelty of the role of the private military. The editors may speak of “mercenaries in a modern guise,”\textsuperscript{137} but, significantly, they highlight the differences between the mercenaries of the past and the new generation of “private military companies” or what they call “PMCs.”\textsuperscript{138} Certainly, the highly publicized roles of firms like Blackwater (renamed Xe Services, LLC) and Triple Canopy have been quite visible in the press, and there was public interest in the Russian government’s permitting the two largest Russian energy companies to arm and deploy private security forces. It is not clear when the break between the mercenaries of the past and the current phenomenon is thought to have started and ended, but there was intensive mercenary activity in Africa in the 1960s and 1970s. Thus, when there was a remarkable confluence of the Hong Kong investment banking firm of Jardine Fleming, the Papua New Guinean government, copper mines, and mercenaries in 1997, it was not clear whether we were witnessing part of a very old story or the beginning of an emerging trend.

\textsuperscript{134} See Elizabeth Borgwardt, \textit{A New Deal for the World: America’s Vision for Human Rights} 189 (Belknap 2005).


\textsuperscript{137} Chesterman and Lehnardt, \textit{From Mercenaries to Market} 3 (cited at 136).

\textsuperscript{138} Id at 1–2.
C. The Taxonomic Positivist

If, as I have been suggesting, the Westphalian state system was not quite the historical reality commonly suggested in the globalization narrative, I also argue that the writings of international legal theorists even in the Anglo-American tradition at the high watermark of positivism, despite their confident points about the sovereign state, are replete with speciation, sometimes tortured, about the varieties of sovereign bodies. Although students of international law are taught that scholars of the nineteenth century were erroneously “obsess[ed] with sovereignty as absolute, autonomous, and living in a state of nature,” David Kennedy has urged us in *International Law and the Nineteenth Century: History of an Illusion* not to look to the nineteenth century for this positivist theory but rather to see the height of state-centric positivism emerging at the beginning of the twentieth century “contemporaneous with the most insistent calls for modernization of the field.” Kennedy argued that, theories of state positivism, rather than originating in the nineteenth century and experiencing a correction in the twentieth century, came to full flower in the early twentieth century, leading him to observe “an incredible shrinking nineteenth century” of state positivist thinking.

Nevertheless—and Kennedy agrees—there was a fair amount of focus on defining the state in the nineteenth century as well as the early twentieth century, and, as I have suggested, it is the tortured speciation that is of particular interest. Thus, Henry Wheaton may start his chapter on “Nations and Sovereign States” with a sentence affirming that “[t]he peculiar subjects of international law are [n]ations, and those political societies of men called [s]tates,” but then comes the slicing and dicing, even between the nations and states. Wheaton is writing early enough in the nineteenth century to need to revisit the distinction made between real and personal treaties, the latter relating to monarchical family alliances and “expire, of course, on the death of the king or the extinction of his family.” In addition, he confidently explains that the “great association of British merchants” although not states, exercised “the sovereign powers of war and peace in that quarter of the globe, without the direct control of the crown.” And such “powers are exercised by the East India Company in subordination to the supreme power of the British empire, the external sovereignty of which is

---

140 Id at 103.
142 Id at 38–39.
represented by the company towards the native princes and people, whilst the
British government itself represents the company towards other foreign
sovereigns and [s]tates." Wheaton has to address the subject of semi-sovereign
states under the protectorate of other states and gives the example of the City of
Cracow as well as the "[p]rincipalities of Moldavia, Wallachia, and Servia, under
the suzeraineté of the Ottoman Porte and the protectorate of Russia." Similarly,
he explains that the "political relation of the [Native-American] Indian nations
on this continent [North America] towards the United States, is that of semi-
sovereign States, under the exclusive protectorate of another power." In short,
Wheaton devotes a number of pages to such careful deliniation.

George Grafton Wilson and George Fox Tucker devote a full chapter of
their international law textbook to "Legal Persons having Qualified Status,"
which is divided into sections dealing with states that are members of
confederations and other unions, neutralized states, protectorates and
suzerainties, corporations, individuals, insurgents, belligerents, and
"communities not fully civilized." In that vein, they devote a long paragraph to
discussing "African companies chartered by the European states seeking African
dominions [that] have had very elastic charters in which the home governments
have generally reserved the right to regulate the exercise of authority as occasion
might demand." After making specific reference to the British South Africa
Company, Wilson and Fox explain that the "acts of these companies become the
basis of subsequent negotiations among the various European states, and the
companies have a very important influence in molding the character of African
development." It is interesting that W.E. Hall chose to give his chapter on the subjects of
international law the title "Persons in International Law, and Communities
Possessing an Analogous Character." Along those lines, he states that
"[c]ommunities possessing the marks of a state imperfectly are in some cases
admitted to the privilege of being subject to international law, in so far as they
are capable of being brought within the scope of its operation." Furthermore,
he argues: "States commonly understood to be subject to law in a partial manner

143 Id at 26.
144 Id at 47.
145 Wheaton, Elements of International Law at 49 (cited in note 142).
147 Id at 61.
148 Id at 62.
149 William Edward Hall, A Treatise on International Law 17 (Clarendon 5th ed 1904).
150 Id at 23.
are classed under the several heads of states joined to others by a personal, real, federal, or confederate union, and of states placed under the protection or suzerainty of others.”

Basically, he makes no suggestion of uniformity among the subjects of international law and their rights and obligations. Similarly, Travers Twiss may have adopted the title *The Law of Nations Considered as Independent Political Communities* for his textbook on international law, but the thirty-seven pages he devotes to his chapter on the Ottoman Empire struggles through difficult speciation. Even while asserting a strong positivist position by arguing that the “internal constitution of a Political Body of States is altogether ignored by the Law of Nations,” he is immediately forced to state “whereas the internal organization of a Federal System of States is the result of an International Compact.” Indeed, from there Twiss goes on to distinguish between various kingdoms having the same sovereign, creating a “Personal Union of an accidental kind” and those “of a permanent character.” The taxonomic variations are carefully sorted out.

In his study of imperialism and its formative impact on the development of international law, Antony Anghie has recently provided a powerful description of how positivist theory faced a quandary in its effort to deal with treaties in the colonial encounter: “This history of treaty making posed a challenge to the positivist framework as the fundamental premises of positivism, when extended to their logical conclusion, implicitly suggested that treaties with non-Europeans were impossible.” The compelling need for agreements and treaties meant that some sort of ability to contract had to be recognized. “Treaties between European and non-European states,” Anghie tells us, “thus became the objects of positivist scrutiny. But the methodology used by positivists to examine these treaties had the paradoxical effect of erasing the non-European side of the treaty even when claiming to identify and give effect to the intentions of that party.”

151 Id.
153 Id at 48.
154 Id at 49 (emphasis in Twiss).
156 Id at 71. This phenomenon bears a clear resemblance to legal arguments made during the Philippine insurrection against the US that somehow the insurgents, not being Hague Treaty signatories, were bound by its provisions against the US even while the US was not similarly bound against the insurgents. Yale Law Professor Theodore S. Woolsey asserted that “there was no obligation on the part of the US Army to refrain from using the enemy’s uniforms for the enemy’s deception.” Mark S. Weiner, *Teutonic Constitutionalism: The Role of Ethno-Juridical Discourse in the Spanish-American War*, in Christina Duffy Burnett and Burke Marshall, eds, *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* 48, 74 (Duke 2001), citing Creighton
Nevertheless, Anghie’s depiction of the tortured logic of positivism and the fact that there was in the end only one side to the bargain, gives powerful testimony to the complicated, porous character of the subjects of positivist international law. Lauren Benton has similarly noted that “[i]ndeterminancy was being articulated as policy – even as a core principle of an imperial law based on divisible sovereignty.” Moreover, she describes not only the complicated parsing of sovereignty deploying “territorial anomalies,” but she also delves specifically into the status of the Indian princely states of nineteenth-century South Asia as well as the law that developed from John Marshall’s “phrase defining American Indian nations within the United States as ‘domestic dependent nations’.” Still, as I have suggested the parsing of sovereignty was not merely an imperial device but part of the general theoretical landscape.

D. The Myth of the Nation State

As I have suggested, the globalization narrative focuses not only on the loss of state sovereignty but also on the demise of the nation-state. We have witnessed a long wave of analyses of the nation-state and its history starting in the 1980s and intensifying with the breakup of the Soviet Union, with famous contributions from authors like Ernest Gellner, John Breuilly, and E.J. Hobsbawm debating over the varying interrelationships among the nation-state, industrialization, and capitalism. Predictably, Daedalus devoted its summer 1993 issue, in the wake of the split-up of the Soviet Union, to “Reconstructing Nations & States.” There was even a pre-history of the nation-state written by John Armstrong under the title Nations before Nationalism, with a long discussion of sedentary versus nomadic populations. The nation-state has had an important history even if the contours, the impact, and the causes of its rise and decline were in contention.

Contemporaneously with this increased study of the nation-state, historians began to argue that at the very epicenter of the nation-state idea, Western Europe, the nation-state was very slow in developing and there were always important competing attachments. Perhaps the most important of these contributions was Eugen Weber’s Peasants into Frenchmen, where he tells the story of how halting the course to nation-state was in rural France:

---

158 Benton, Search for Sovereignty at 258 (cited in note 7).
159 Id at 222–78.
160 See generally John A. Armstrong, Nations Before Nationalism (UNC 1982).
The famous hexagon can itself be seen as a colonial empire shaped over the centuries: a complex of territories conquered, annexed, and integrated in a political and administrative whole, many of them with strongly developed national or regional personalities, some of them with traditions that were specifically un- or anti-French.\(^{161}\)

If Karl Deutsch defined a country by being simply “as large as the interdependence it perceives,” Weber retorts with regard to the France around 1870: “By that standard the hexagon shrivels away.”\(^{162}\) In *The Discovery of France*, Graham Robb underscored the immense particularity of the French populations prior to the First World War.\(^{163}\) And then there is the story of the corporatist world of guilds and other entities that Mack Walker tells in *German Home Towns*.\(^{164}\) All of these authors show us that just as the myth of a “state system” was a reductive simplification of a much more varied body of entities, so too the concept of a culturally homogenous “nation” should be replaced by a picture of much more heterogeneous communities.\(^{165}\)

E. Overcoming the State

Although, as I have suggested, the Westphalian international order has, at best, a short and weak history in the West, there are numerous scholars who, rather than argue that there has been a demise of the Westphalian state system as part of the globalization narrative, instead prescribe its demise. In 1964, Wolfgang Friedmann’s *The Changing Structure of International Law* called for change from international law based on states as its subjects very similar to J.L. Brierly’s *The Law of Nations* call in the 1920s and in almost the same language.\(^{166}\) It is interesting, then, to see still another, newer generation make some of the same arguments with little recognition that the position may be almost as traditional as the “traditional” positions they are criticizing.


\(^{162}\) Id. (citing Karl Deutsch, *Nationalism and Its Alternatives* 7 (Random House 1969)).


\(^{165}\) Although Benton focuses in *A Search for Sovereignty* on “an imperial legal regime in pieces,” at 299 (cited at 7), she notes more generally that despite a reality to sovereignty, it is “often more myth than reality,” and that “[p]olitical space everywhere generates irregularities” at 279. She observes that “[m]ost boundaries are porous and many are contested, and states cannot consistently enforce laws to regulate activities across and within borders” at id. In essence, her outward story of distant imperial reaches can be turned inward and read alongside Weber and Walker.

\(^{166}\) On Friedmann and Brierly, see Landauer, *J.L. Brierly* at 917 (cited in note 3).
Paul Schiff Berman provides an example in his careful enunciation of a new “law and globalization” approach as an expansion of “legal pluralism” in his article entitled *From International Law to Law and Globalization*.\(^{167}\) He opens his article announcing, “Over the past two decades, it has become increasingly clear that, in order to understand the cross-border development of legal norms, we need to move beyond the limiting framework of international law.”\(^{168}\) As I have suggested, this sort of critique of the state system of international law is much older than the past two decades. Similarly, Berman calls for a “new scholarship” that “must be truly interdisciplinary, drawing on insights not only of international relations theorists, but also of anthropologists, sociologists, critical geographers, and cultural studies scholars,” seemingly not acknowledging the long and rich tradition of interdisciplinarity among international legal scholars.\(^{169}\) Berman argues for an application of legal pluralism and an understanding of the multivalence of globalized life to international law:

> International law scholars seeking to understand the multifaceted role of law in settings beyond governmental institutions must also take seriously the insights of legal pluralism. In general, theorists of pluralism start from the premise that people belong to (or feel affiliated with) multiple groups and understand themselves to be bound by the norms of these multiple groups.\(^{170}\)

Berman clearly recognizes some of the complexity of his own narrative when he states, for example, “I recognize, of course, that the purported ‘stable’ system of sovereignty, territoriality, and world order that globalization supposedly challenges may never have actually existed. Instead, such systems have most likely always been contested and in flux.”\(^{171}\) In this, Berman articulates much of what I have been trying to express. But, curiously and significantly, he buries this in a footnote, which, as we have learned from Anthony Grafton, lives a separate narrative life.\(^{172}\)

Berman and other legal pluralists, like Hari Osofsky,\(^{173}\) who inveigh against the Westphalian system, differ from most scholars of globalization in their perception of just how strong the state system remains. Indeed, they have a

---


168 Id at 487.

169 Id at 485.

170 Id at 507.

171 Berman, 43 Colum J Transnatl L at 490 n 11.


173 See, for example, Osofsky, 32 Yale J Intl L 421 (cited in note 7).
good deal to say in their concerns about the residual power of the state system within contemporary international law, but they also share with many scholars of globalization a vision of a past international legal system based on a Westphalian state order that was much stronger, more all-encompassing, and more aligned to the nation-state than it may have ever been in reality. Whatever their differences on the present power of the state, at both ends of the spectrum there is consensus about the over-arching dominance of the state system in the past. And it is just that dominant view of the past that I argue needs to be reconfigured.

V. CONCLUSION: MAPPING WITHOUT MAPS

When Boaventura de Sousa Santos entitled the evocative penultimate chapter of *Toward a New Legal Common Sense*, "Law: A Map of Misreading," he drew directly from Harold Bloom's *A Map of Misreading* of 1974. But unlike Bloom, de Sousa Santos seems to be really serious about maps, stating that "[the idea of space and spatiality is central to the theoretical construction I am presenting in this book]." He further asserts: "The central argument of this chapter is that laws are literally maps. Maps are ruled distortions of reality, organized misreadings of territories that create credible illusions of correspondence." In addition to reminding us of the Jorge Louis Borges short story about the emperor who commanded the creation of a map that so perfectly reflected every detail of his empire that it turned out to be identical in size to his empire—the same Borges story with which Jean Baudrillard opens his *Simulacra and Simulation*—de Sousa Santos uses the cartographical terms of "scale," "projection," and "symbolization" to talk about law. He then turns to the opening chapter of Erich Auerbach’s *Mimesis*, where Auerbach masterfully distinguishes between the realism of Homeric and Biblical narrative. In essence, a theory of narrative takes over de Sousa Santos’s mapping chapter. He understands all along that there is a temporality to his spaces, talking of "time-spaces" and, without question, he is deeply engaged throughout his book in real spaces—very particular problems in very particular places. Nevertheless, I would like to use de Sousa Santos’s map-into-narrative movement to suggest that much

175 de Sousa Santos, *New Legal Common Sense* at 418 (cited in note 71).
176 Id at 419.
There may be other indications of a “spatial turn” in recent globalization studies. Timothy Brennan, for example, asserts that “the significance of the turn to space/place in globalization theory lies, first of all, in the overcoming of temporality.” I have found, however, that the spatial inevitably turns back to the temporal and, with the primacy of the narrative, geographical particularity loses out. In 1989, Sakeus Akweenda wrote an article for the British Yearbook of International Law entitled *The Legal Significance of Maps in Boundary Questions: A Reappraisal*. In his opening paragraph, he complained that “this subject has been neglected by writers.” His discussion then turns very historical, but that is as it should be—he needed to work through the history of maps used as evidence in international law, the history of the map in question, and the history of the claims in dispute. He also could not write about maps without understanding how contentious any map could be: in his case study of a border dispute in Namibia, the map created by the UN had a disclaimer stating that “the delineation of the boundaries between Namibia and neighbouring countries and the names shown on this map do not imply official endorsement or acceptance by the United Nations as they are to be determined by the independent government of Namibia.”

Akweenda’s article caught my attention because of how unusual it seems in the literature of international law scholarship. It seems we have multiple “maps of misreading” and plenty of “mapping” but few real maps. This fits into a broader pattern of the international legal imagination—whether in its discussions of regionalism, globalization, or the state system—to drift away from place and space.

Hari Osofsky has identified what she perceives as a rebirth of geography in the US as “postmodernism—broadly defined—with its focus on spatiality began to replace the progress narrative . . . .” She is not alone in discerning such a rebirth. Caren Kaplan’s *Questions of Travel* advises that:

---

179 It is interesting in this context that philosopher/political theorist Seyla Benhabib draws from that other philosopher/political theorist Hannah Arendt applying spacial metaphors to the temporal in her discussion of the “web of narratives.” Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton 2002).


182 Id at 251.

183 Osofsky, 32 Yale J Ind L at 423 (cited in note 7).
In the current moment, space is in the midst of a renaissance. It finds a new reassertion in the postmodern critical practices that have emerged in Euro-American academies since the post-World War II era, taking on a specific intensity in the period following decolonization and the increasing flexibility and mobility of capital that mark the last two decades.\(^{184}\)

It is interesting that Kaplan makes this assertion about travel and discourses of displacement, both temporally loaded conceptions—almost as temporally loaded as globalization itself. Kaplan is herself quite insistent on the relationship of time and space, stating, "[w]hen a 'place on a map' can be seen to be a 'place in history' as well, the terms of critical practice have made a significant shift."\(^{185}\) Significantly, in describing the work of Gilles Deleuze and Félix Guattari, she writes of their "metaphorical mapping of space."\(^{186}\) This observation resonates with my description of de Sousa Santos. In the end, both in broader theory and in international legal thought—where the profile of geography and the geographically specific experience should be greater—space becomes more metaphorical than concrete. It is, rather, a deep, historically, and culturally specific analysis of the impact of international forces intertwined with the local's own layers of past interactions, intrusions, and assimilations that is most needed.\(^{187}\) I would like to return to the pastry layers of Henri Lefebvre's *mille-feuille*, suggesting that not only are there many layers but also that each layer is made of different pastry mix.


\(^{185}\) Id at 25.

\(^{186}\) Id at 86.

\(^{187}\) In the layering of various forces, including historical and local, see generally Balakrishnan Rajagopal, *The Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India*, 18 Leiden J Ind L 345 (2005).