Worthy of the “increasingly global perspective”?

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Considering the debates on current backlashes against international law and the international rule of law, the matter of a peaceful ocean governance has come under pressure. This is due not least to the fact that states sharing this common goal yet disagree on how to interpret (newly created) treaty law such as the United Nations Convention on the Law of the Sea (UNCLOS). Although international law is nowadays and especially in the western hemisphere associated with the ideal of creating a more just and peaceful world, other voices increasingly consider it predominantly an instrument of power to achieve political objectives.

Following Ranganathan’s contribution on the legal concept of Common Heritage of Mankind (CMH) in *The Battle for International Law*, that history may play a role in this perception of Western hegemony. In this short essay, I will explore how one might methodically bridge the gap between the *battles* of the past detailed by Ranganathan and different perspectives in international law today. My argument is that such a reflection on methods is important, because the normative struggles of the past and their intellectual frameworks are still likely to affect the practice of international law today. These theoretical questions are not present in Ranganathan’s text, addressing them, however, seems useful to integrate the normative knowledge in the current debate.

New light on UNCLOS by comparative international law and global legal history

In the 1970s to early 1990s, the so-called developed and developing states waged an ideological battle along different lines over the ocean-space, its seabed, and mineral resources. Yet, another battle over the concept of the Exclusive Economic Zone (EEZ) took place simultaneously. In the reviewed volume, it is stated that both proved to be a ‘Pyrrhic victory for the third world’ (p. 24). In my reading, the success story of achieving such a comprehensive treaty, also known as the ‘Constitution for the Oceans’, ultimately resulted in a pushback for the New International Economic Order (NIEO).

However, the developing countries saw the NIEO as an essential part of their considerations for developing the concepts of the CMH as well as the EEZ. I will take up Ranganathan’s and the editors’ *battle* metaphor and extend it in two respects with regard to UNCLOS: First, I will look into the concepts of comparative international law as well as global legal history and how both of them might help to shed a new light on the *lost* legal thoughts during the negotiation process. In the second part, I will propose that we should revisit the battle sites in order to reemphasize the unrealized possibilities of a more equitable international law.

The things we lost in battle: Searching for sunken legal thoughts in history

International law is increasingly confronted with the perceived phenomenon of divergent interpretations of its legal texts. There are two common ways of conceiving them, either as *backlashes* or as *regional approaches*, the latter has found methodological expression in comparative international law. However, when considering the law of the sea, a perspective that methodically combines its historical development and the contemporary practice still seems rare. In understanding how the current views of UNCLOS in international relations came about, though, history seems to be a critical factor in some cases.

As Anthea Roberts et al. state: '[comparative international law is concerned with] similarities and differences in how international law is understood, interpreted, applied, and approached by different national and international actors.' Or, as Alejandro Rodiles recently put it, comparative international law 'postulates that this, in principle, universal body of law may actually be about many particular versions of it'. While the discussion of comparative international law, which first emerged in the 1980s in the course of the East-West conflict, had temporarily fallen asleep with the so-called *end of history*, this theoretical field has been developing all the more rapidly in recent years. Dealing with a multiplicity of perspectives, comparative international law shows points of overlap with the approach in the history of international law to speak not of *the history* of international law but of its histories.

In her contribution, Ranganathan adopts a historical perspective that is in line with the volume's objective and provides a useful starting point for analyzing the consequences of the negotiations for the present. For how narratives about this *battle* are actually reflected in the various practices of UNCLOS today would also be a question worth asking.

For quite some time now, the disciplines of comparative law and legal history have been regarded – at least to a certain extent – as mutually beneficial. E.g., James Gordley argues that comparative law needs legal history as 'legal rules acquire their structure over time'. While a historian who wants to research the 'law of a given time and place, […] would need a comparative approach to see which rules are characteristic of it.' In the present context, I propose that the emerging fields of comparative international law and global legal history could develop similar synergies, in examining the negotiation process of UNCLOS. Thomas Duve recently suggested that global legal history should inter alia ask 'for the mechanisms that have caused what is called the globalisation of law and legal scholarship, and the role of the latter in globalisation.' He goes on to define global legal history as the 'critical history of the production of multinormative knowledge, understood as a process of distributed knowledge production through cultural translation, comprising theory and practice, drawing on a wide range of sources, on a transnational scale, with special attention for the dialectics of glocalisation.' To recall the thoughts on comparative international law of yet another contributor to the volume at hand, Martti Koskenniemi pleaded in 2011:

> A serious comparative study of international law would contribute to that same shift – to thinking of the world no longer in terms of what Hegel used to call abstract universals but seeing all players as both universal and particular at the same time, speaking a shared language but doing that from their own, localizable standpoint. It would, to put it somewhat grandly, contribute to the ideology critique of international law, and of the institutions sustained by that professional vocabulary.

Setting sails: Revisiting the battle sites

The perspective of *the battle for international law*, suggested by the editors of the volume, might serve as a critical juncture, a focal point from where to start such a methodological endeavor. This is because international treaty negotiations are likely to bring to the fore otherwise hidden layers of normative knowledge. Additionally, Ingo Venzke argued that it might be helpful to think about international law also in the terms of: 'How could it have been otherwise?' If we look at the *battles* for UNCLOS, we can see that they were not concentrated on a single issue but have to be seen in a broader context in which the NIEO took an important role. Ranganathan successfully showed this in the case of the negotiation process of the seabed and CHM. Another critical area would certainly be the negotiation process for the EEZ concept. M.K. Nawaz even claimed in 1980: 'Indeed, it constitutes the most significant development in the law of the sea, since Hugo Grotius wrote his celebrated brief on *Mare Liberum*.' Although one must certainly be cautious in identifying such *revolutionary moments* in history, EEZs now cover about 40 percent of ocean space, and the developed countries have been fast to implement them – after making sure that freedom of navigation would not be hindered for their navies. The NIEO and TWAIL scholars, as e.g. Rama Puri pointed out for India in 1980, were a driving force behind the EEZ-concept. Ironically, developed countries are today by far its biggest beneficiaries. Moreover, looking at recent publications on UNCLOS, the fact that developing countries have played such an important role in the EEZs development with its underlying rationale of the NIEO, seems to have been pushed into the background. In 1979 with the UNCLOS negotiations still underway, Robert H. Manley referring to the newly independent states saw the opportunity at hand that UNCLOS will 'become worthy of the increasingly global perspective of the period in which the proceedings are taking place.' However, in March 1982, when the UNCLOS negotiations came to a close, Bhupinder S. Chimni noted that the draft convention 'only secures the most vital interests of imperialism by giving them legal *imprimatur*', as Raganathan pointed out.

Revisiting these former *battle sites* of international law through a global legal historical perspective with the question proposed by Venzke might serve two purposes: First, to bring the unrealized possibilities of another international law back to the surface. The engagement with international law through a global perspective would mean to take into account the normative knowledge that ultimately brought about the NIEO and can be expected to have still influence on the interpretations of UNCLOS today. The global legal historical perspective on *battles* could also be another piece in the mosaic of a more nuanced understanding of comparative international law today. Second, thinking about international law in the metaphor of

past *battles* could help to emphasize its power in the field of international relations, just as it forces us not to lose sight of its long-term consequences for the people to whom it applies.

Ranganathan and the editors have provided us with a useful map that allows us to bring history back in, set sail and do further research on each of the destinations.
