



**MAX-PLANCK-INSTITUT**  
FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT  
UND VÖLKERRECHT



**HeiParisMax**  
DEUTSCH-FRANZÖSISCHE  
AKADEMISCHE PARTNERSCHAFT

## “HISTORICAL CAPITALISM AND INTERNATIONAL LAW”

### CONFERENCE REPORT

**Sciences Po, Paris, 18th and 19th January 2018**

A young scholars conference on “Historical Capitalism and International Law” took place at Sciences Po Law School, Paris, on the 18th and 19th of January 2018, in the framework of the program *Colloques juniors du Centre interdisciplinaire d’études et de recherches sur l’Allemagne (CIERA)*. Scholars from different places of the world shared their respective research, bringing different examples to start a conversation on the relationship of capitalism and international law. The supportive environment of the conference created the conditions for further collaborations in and the emergence of a small network of young researchers with an interest in further discussing issues raised during the two days discussion.

The Conference was organised by four doctoral candidates: Filipe Antunes Madeira da Silva (Sciences Po Law School), Robin Caballero (Humboldt Universität zu Berlin/ Université Paris 1 Panthéon-Sorbonne), Alberto Rinaldi (Sciences Po Law School) and Milan Tahraoui (Université Paris 1 Panthéon-Sorbonne/ Max Planck Institute for Comparative Public Law and International Law). Also, Leonie Vierck (Max Planck Institute for Comparative Public Law and International Law) contributed to the first stages of the organisation. They came together around the HeiParisMax network and received an initial grant from the CIERA, which made the organisation of the conference possible. They also received additional financial support from the *Collège doctoral franco-allemand en droit public comparé européen*, Sciences Po Doctoral School and the Max Planck Institute for Comparative Public Law and International Law. The organisers have finally relied upon Sciences Po Law School, which has kindly opened its doors to participants and provided full logistic support to organisers. The following report is not extensive and is only intended as a summary of the project and the main ideas presented during the two days conference.

The notion of historical capitalism was borrowed from Immanuel Wallerstein, who defined it as a specific historical social system based on the principle of the continuous accumulation of capital. “Historical capitalism is, thus, that concrete, time-bounded, space-bounded integrated locus of productive activities within which the endless accumulation of capital has been the economic objective or ‘law’ that has governed or prevailed in fundamental economic activity.”<sup>1</sup> The definition calls for a material, rather than abstract, analysis of what capitalism has been like in practice, paying attention to its economic, social, political and cultural dimensions. During the conference, the view that all these dimensions could be further articulated through observing the legal dimension has been further developed. International law has indeed played a substantial role in the creation of a world capitalist system, through the legitimation of an international economic and political system grounded on the existence of a world market for the production and circulation of goods and services.<sup>2</sup>

The conference offered a first opportunity to combine insights from two prominent scholarships in the fields of law and history. On the one side, international lawyers have been increasingly interested in making historical interventions in their discipline in a process which has been generally referred to as a turn to history in international law.<sup>3</sup> It particularly consisted in the construction of critical histories of the discipline, questioning standard accounts by stressing elements such as its Eurocentrism, its role in the legitimation of colonial violence and imperialist projects of governance, or more generally the uneven distribution of power and resources in the world.<sup>4</sup> The turn to history is hence generally associated to the construction of new futures for international law by questioning the way narratives about its past keep informing current legal understandings and practices.<sup>5</sup>

On the other side, the concept of capitalism seems to be coming back in historical scholarship particularly in the US after the financial crisis in 2008. In the US historians have started inquiring on its use as a methodological tool to understand systemic processes which still affect the way the

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<sup>1</sup> Immanuel Wallerstein, *Historical Capitalism with Capitalist Civilisation* (London / New York: Verso, 1983), 18.

<sup>2</sup> Emmanuelle Jouannet, *Le Droit International Libéral-Providence: Une Histoire Du Droit International*, Collection de Droit International 69 (Bruxelles: Editions Bruylant, Editions de l’Université de Bruxelles, 2011), 7.

<sup>3</sup> Emmanuelle Jouannet and Anne Peters, “The Journal of the History of International Law: A Forum for New Research,” *Journal of the History of International Law* 16 (2014): 1–8; Fassbender Bardo and Anne Peters, eds., *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012).

<sup>4</sup> Arnulf Becker Lorca, “Eurocentrism in the History of International Law,” in *The Oxford Handbook of the History of International Law*, ed. Bardo Fassbender and Anne Peters (Oxford University Press, 2012), 1034–56; Emmanuelle Jouannet, “Des Origines Coloniales Du Droit International,” in *The Roots of International Law: Liber Amicorum Peter Haggemacher*, ed. Pierre-Marie Dupuy and Vincent Chetail (Leiden/Boston: Martinus Nijhoff Publishers, 2014), 649–71.

<sup>5</sup> Martti Koskenniemi, “Histories of International Law: Dealing with Eurocentrism,” *Rechtsgeschichte* 19 (2011): 152–76; Anne Orford, “On International Legal Method,” *London Review of International Law* 1, no. 1 (January 9, 2013): 166–97.

world is organised today.<sup>6</sup> As a result, new histories of capitalism have recently emerged, providing sophisticated readings of the emergence, expansion and the functioning of capitalism as a global and interconnected system.<sup>7</sup>

At the crossroad of these insights, interventions in the conference can be considered as a part of a first attempt to combine a historical analysis of both, capitalism and international law. The interdisciplinary effort intended to thoroughly discuss both, the role of law in the construction of historical systems and the use of history as a tool to offer a more comprehensive account of law, by situating legal processes and revealing their connections with broader social developments.

The conference was opened by Professor Emmanuelle Tourme-Jouannet (Sciences Po Law School), who praised the relevance and the urgency of the topic today, as well as the necessity of focusing on historical aspects in order to have a more comprehensive understanding of current issues of international importance. She stressed the centrality of the market-economy and the capitalist system for understanding international law. As much as colonialism and imperialism, these are elements which also define the identity of international law, and therefore need to be studied for a more comprehensive view of its overall functioning.

She then welcomed Professor Rémi Bachand (Université du Québec à Montréal), who made his keynote address on “Capitalism, Imperialism and International Law”. Professor Rémi Bachand stressed the importance of taking the material reality of capitalism and the changes of its structure for understanding its relationship with international law. Drawing on both the French school of regulation and social structures of accumulation theory, he suggested international institutions and capitalism co-constituted each other at different historical moments, along the evolution of different regimes of capital accumulation. He proposed four periods for studying the evolution of economic structure and international law – 1945-1971, 1971-1982, 1982-1997, and 1997-today – explaining in each case how transformations in economic accumulation paralleled institutional changes.

These initial interventions were followed by panels of selected participants sitting in pairs. Proceeding from a varied number of fields – the law of war and occupation, international capital regulation, development and investment policies, the movement of people and resources, and the management of land and maritime resources – they inquired into legal institutions and regimes in order to examine the role of international law in specific aspects of historical capitalism.

In the first panel, Nicolas Karmis (Université Paris II Panthéon-Assas) and Eric Loefflad (University of Kent) put into perspective capitalism and the law of war. On the one side, Nicolas

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<sup>6</sup> Jurgen Kocka and Marcel van der Linden, eds., *Capitalism: The Reemergence of a Historical Concept* (Bloomsbury, 2016).

<sup>7</sup> Sven Beckert, *Empire of Cotton: A Global History* (New York: Alfred A. Knopf, 2014).

Karmis discussed the mechanism of economic coercion found under article 16 of the Covenant of the League of Nations, and how that was interpreted by German scholars of the time as incompatible with continental conceptions of war. His presentation entitled “The Ideological Interpretation of the Article 16 of the Covenant of the League of Nations by the German Doctrine”, showed in fact how ‘economic sanctions’ became for the first time institutionalized and legalized under the League system, and how this very conception of warfare’s reprisal was fiercely opposed by German scholars of the time. On the other side, Eric Loefflad reassessed early principles of the law of occupation, specifically the protection of local property from plunder by foreign occupiers, and connected it with the protection of European property interests in the non-European world through extra-territorial legal regimes justified via the standard of ‘civilisation.’ In his paper, entitled “Occupation, Civilisation, and the Protection of European Property: A World-Historical Perspective on the International Illegality of Territorial Conquest”, he introduced a materialist account showing how these differentiated applications were actually linked to one specific political economy for the accumulation of capital in the world.

In the second panel of the day, the two speakers took the participants in a detour into financial legal matters which are certainly at the heart of the current capitalist system. Kanad Bagchi (Max Planck Institute for Comparative Public Law and International Law) explored how international legal rules related to the control of capital have participated in uneven distributions of resources in the world between the centre and the periphery. His paper “Historical Capitalism and Capital Control Measures” suggested combining insights from both TWAIL and the world-system theory proposed by Immanuel Wallerstein to better understand the functioning of the international monetary system and its imperialist nature within a capitalist system. Following him, Johanna Gautier (Graduate Institute of International and Development Studies) focused on the case of Bermuda to explore the financial deregulations of the 80s and 90s. Her intervention “Financial Deregulation in the 1980s-1990s: A New Market for Territorial and Institutional Competition” showed the British financial deregulation of the stock exchange, exploring its main effects on the island and the reactions it generated while reshaping the Bermudian capital market and its position in the world.

The second day was opened by a panel centred on histories of capitalism expansion, by focusing on two very interesting examples/stories. Aikaterini Grymaneli (Université Paris II Panthéon-Assas) was interested in the law of the sea, retracing the evolution of the regime of the areas beyond national jurisdiction. Her historical inquiry entitled “Capitalism Expansion and the Law of the Sea: The Example of the Exploitation and Conservation of the Resources of Areas beyond National Jurisdiction” demonstrated how developing and developed States have successively attempted to reform that regime in order to favour either the principle of common heritage of human kind or the

freedom of the high seas, in the definition of rules for the exploitation of resources in the Area. Dudi Rulliadi (Melbourne Law School) has instead focused on the case of Indonesia to examine the normative foundations of its economy since independence. In his paper “From Dutch Colonialism to US Developmentalism: Capitalism and the Dynamics of Indonesian Law and Policy on Economic Development from Independence to the New Order Era”, he showed how changes at the international level have informed the relationship of the state with the market in Indonesia, situating the position of private enterprises in a national economy within a larger history of development in the nation.

The second panel of the day was equally devoted to the histories of capitalist expansion. In the first presentation, Olaoye Folake (Chinese University of Hong Kong) proposed a critical account of international investment law, focusing on the context of African development and foreign investments. Her paper “Empire, Capital and Protection of Foreign Investment: Historical Origins of Transnational Investment Law in Africa” attempted to situate current challenges of transnational investment law within the history of the presence of international investment in the region. Anam Soomro (Berlin Graduate School for Transnational studies) has instead showed how the development of capitalism went hand in hand with the colonial-racial management of mobility across many parts of the world. Proposing a global history of freedom(s) of movement, her presentation “A Critical Inquiry into Freedom of Movement: Race, Colonialism and the Making of International Law” offered a genealogy of the evolution of the international laws of mobility within the context of a capitalist system.

The last panel of the conference explored the public private interactions inherent to capitalism. It was opened by Filipe Antunes Madeira da Silva (Sciences Po Law School), who took the example of the Amazon rubber boom as an instance for understanding the expansion of historical capitalism in the global countryside at the turn of the 20th century, exploring the role of law in the emergence of a rubber market and its integration within world circuits. His intervention entitled “How the Putumayo Was Won: Sovereignty and Property in the Rubber Lands” was focused on how notions of property and sovereignty were simultaneously advanced by actors interested in the benefits of rubber, taking part in the conquest of the territory according to new needs of capital and industrialisation. Then, Claire Debucquois (Columbia Law School) has proposed a study of land control and access in Brazil, adapting some of Braudel’s ideas on the alliances between the ‘prince and the merchant’ to study the role of law between the public and the private in the creation of markets. In her presentation “Braudel in Brazil: The Merchant, the Prince, and the [Law of the] Land”, she provided a historical account of legal institutions related to land in Brazil, focused on the close link between the merchants and successive forms of governments in the country.

The two days conference was closed by an interdisciplinary roundtable entitled: “Franco-German Looks into Historical Capitalism and International Law: Exploring Geographical and Disciplinary Boundaries”. The round-table was an opportunity for the participants to reflect upon the discussions of the two previous days and a possibility to bring the network forward. The round-table was composed of Professors Pierre Gervais (Université Sorbonne Nouvelle – Paris 3), Claire Lemerrier (Centre de Sociologie des Organisations – Sciences Po) and Horatia Muir Watt (Sciences Po Law School), and moderated by Professor Régis Bismuth (Sciences Po Law School). Professor Ingo Venzke (Universiteit Van Amsterdam) was also expected to participate in the final round table, but he was unfortunately prevented to join due to major meteorological conditions which led to the cancellation of trains.

The discussion brought some insightful perspectives to be further investigated in the near future. The first element that recurred was related to the definition of capitalism, its variations and the possibility of tracing clearer limits for the concept. That might require disentangling it from close notions such as liberalism and market-led economy, identifying its limits and variations in time and space, and observing diverging and sometimes contradictory interests of capitalist actors beyond an idea of a capitalist homogenous block. The relationship of law, economy and capitalism also appeared in the discussion, raising questions such as the role of law in the constitution of identities and groups, the increasing use of an economic language and the commodification of law itself, the connection of the public and private spheres in areas such as transnational litigation and the constitution of value chains. The use of a historicised approach to law, paying attention to how legal categories changed in time and space, also appeared as an important aspect to understand the relations of law and capitalism and see the channels of influence of economics over law.

A special issue gathering some of the contributions made during the colloquium should be published in a focus section of the Journal of History of International Law dedicated to the topic of historical capitalism and international law.