

Ultimate Plurality: International Law and the Possibility of Resistance

*Peter Fitzpatrick**

Abstract

A formative plurality is identified in the constitution of international law. This plurality embeds resistance yet also blocks it by enabling a neo-imperial enclosing of international law. Ultimately, however, law's plurality can render the enclosure provisional and secure the possibility of resistance.

How much can come
And much can go,
And yet abide the World!
(Emily Dickinson, "There came a Wind like a Bugle")¹

French Translation

Une pluralité formatrice est identifiée dans la constitution du droit international. Cette pluralité intègre la résistance, mais y fait obstacle aussi, en érigeant une clôture néo-impérial au droit international. En fin de compte, cependant, la pluralité du droit peut rendre cette clôture provisoire, afin d'assurer les possibilités de résistance.

How much can come
And much can go,
And yet abide the World!
(Emily Dickinson, "There came a Wind like a Bugle")

Spanish Translation

Una pluralidad formativa es identificada en la constitución del derecho internacional. Esta pluralidad conlleva resistencia, pero también la bloquea al avalar una concepción neoimperial del derecho internacional. Sin embargo, al final, la pluralidad del derecho puede llevar esta concepción a la provisionalidad y así asegurar una posibilidad de resistencia.

How much can come
And much can go,
And yet abide the World!
(Emily Dickinson, "There came a Wind like a Bugle")

*Anniversary Professor of Law, Birkbeck, University of London, UK. An extravagant plurality of thanks to Caroline Humfress, Rahul Govind and Roberto Yamato for guidance on matters mediaeval.

¹ RW Franklin, ed, *The Poems of Emily Dickinson* (Cambridge, MA: The Belknap Press of Harvard University Press, 1999) at 591.

Inter gentes	7
International.....	8
Appropriation	10
Resolution – negation.....	12
Resolution: positive	15
Resistance	17

Inter gentes

As a prefiguring of international law, the *ius inter gentes* poses a persistent puzzle: how can the “inter-” of international law be realized? A touch of semantics may help set the issue. In English, and as the Oxford English Dictionary has it, the prefix “inter-” denotes being “[b]etween or among other things or persons; between the parts of, in the intervals of, or in the midst of, something; together *with*,” and it extends as well to being “with each other; mutually, reciprocally...”² So, in many of its numerous composites, “inter-” denotes not only relations between distinct entities but also a “something” within which that relation subsists. The “international” of international law provides a convenient instance. Likewise, the Latin *inter* would accommodate being between or among, and so the *ius inter gentes* becomes a law between or among peoples; and its Latin definition would extend also to *inter* being “in the midst of ... something.” Aptly then, the *ius inter gentes* would also be in itself a “something” of surpassing singularity (and the word ‘something’ will now carry a loaded meaning throughout). The puzzle then becomes how this something can be both singular yet constituted in a formative plurality of peoples.

Initially, of course, the Roman empire seemed to oblige and tip the scales very much in the direction of a surpassing singularity. And it was Roman law which initially bestowed influential renditions of *ius inter gentes* within an occidental ‘modernity.’ The telling figure here is Francisco de Vitoria. He will take on further prominence later but for now it may be sufficient to observe how “Vitoria argued that the *ius gentium* of the Roman texts, in which it meant the law shared by all peoples, should be understood also as *ius inter gentes*, that is, a set of rules governing the relations between one people and another.”³ With Vitoria in the sixteenth century, this *ius gentium* fused scholastic theology and an assertive secularism, and this was done in a way, and in a setting, that enshrined an occidental imperialism.⁴ Aptly, Vitoria and the advent of this imperium can be seen as layering a further imperial origin on international law. That further origin is fraught, however.

Such an origin no longer provides a specifically imperial and unitary authority. We are now the denizens of “unseen empires,” as Pope Francis has it—empires operating through “uniform systems of economic power.”⁵ The significance of these unseen empires for international law will be teased out later, but with such law in its conventional conception, a specific unitary authority would seem to be not only absent but impossible. In contrast to the absence of fixed internal boundaries in the Roman empire, in the early modern period of occidental history, and as Schmitt notes, “the territorial order of the ‘state’... became the representative of a new order in international law.”⁶ And, he would add, “[o]nly as a consequence of the clear demarcation of self-contained territories did *jus gentium* become distinctly and clearly *jus inter gentes* [law among nations], *inter gentes Europaeas* [among nations of Europe].”⁷ For this international law, Vattel provided the classic and compact claim that, in and as international law, there remains an “unlimited and unconditional power” of the sovereign state, so that none of the member states of the international “yield ... rights to the general body,” each sovereign state being somehow “independent of all the others.”⁸ Yet it is quite impossible for there to be any commonality, any community, of entities each possessed of such an ultimate completeness. Adapting Nancy, with such a pure plurality any formed relation between nations would instead have to be in “communion,” a communion formed by reference to “a divine presence” or, it could be added, by reference to a deific substitute such as an imperial national sovereignty or the ‘community’ of ‘the international community.’⁹

² *Oxford English Dictionary*, 2d ed (1989), *sub verbo* “inter-, prefix” meanings 1.a and 1.b, Oxford University Press 1989 [emphasis in original].

³ Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999) at 94–95.

⁴ See Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, translated by G L Ulmen (New York: Telos Press, 2003) at ch 2–3. See generally Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005) at ch 1 [Anghie, *Imperialism*].

⁵ Pope Francis, “Pope Francis’s address to the European Parliament in full,” *Catholic Herald* (25 November 2014), online: Catholic Herald <www.catholicherald.co.uk/news/2014/11/25/pope-franciss-address-to-the-european-parliament-in-full/>.

⁶ Schmitt, *supra* note 4 at 129.

⁷ *Ibid* [translations in original].

⁸ Emer de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and the Affairs of Nations and Sovereigns*, translated by C G Fenwick (Washington: Carnegie Institute, 1916) vol 3 at 9.

⁹ Jean-Luc Nancy, *The Inoperative Community*, ed by Peter Connor, translated by Peter Connor et al (Minneapolis: University of Minnesota Press, 1991) at 15.

If we cannot accept the abstracted completeness of the nation-state or the evasive transcendence of this ‘international community,’ then we have to account for the coherence of international law in other terms. The same challenge can be put more pointedly if we break down the category that gets called “general international law” and seek the formative force of its more particular manifestations, such as the formative force of *jus cogens*, an “imperative law” of international law which cannot be countered by nation-states; or the formative force of an international criminal law seemingly lacking the singular sovereign voice; or the formative force that goes to constitute a distinct international customary law. With each of these as well as other formations of international law, there is something that is not contained within a consensual pantheon of nation-states, something distinctly beyond that, yet something more cohering and coherent, more actualized than a pure plurality, a simple diversity. The inescapable challenge now becomes what this ‘something’ may be.

International

Whatever else international law may be, it would not seem to be international. Returning to the story so far, international law emerges from an imperial and religious precursor into a supposedly secular *jus publicum Europaeum*, and there is cogent confirmation that international law still persists as a “European tradition,” with this Europe being “representative of the universal.”¹⁰ Linking then and now, the standard “history of international law has been written so far ... as a history of rules developed in the European state system since the 16th century which then spread to other continents and eventually the entire globe.”¹¹ This is a monistic history, an extraversion of a self-contained Europe or, in terms of another disciplinary designation, this is the product of a European cognitive geography that is supremely singular. Despite then, its “regional dimension” international law still sustains “the label of universality.”¹² Being determinately regional, yet intrinsically of the universal, it does pose a considerable contradiction for a modern, secular international law. As such, this law cannot project its universality from a persistent position of surpassing transcendence. That universality has, then, to be immanent to international law – to its delimited “regional” self. Yet, as Deleuze and Guattari would observe, “whenever immanence is interpreted as immanent *to* Something, we can be sure that this Something reintroduces the transcendent.”¹³

Closer acquaintance with this “Something” refines rather than resolves contradiction. As we saw earlier, and in terms of Vattel’s classic formula, international law was set as an emanation of nation-states, each having and retaining a completeness of power. And as Bauman would deduce, “[i]n a world fully and exhaustively divided into national domains, there was no space left for internationalism.”¹⁴ Yet for there to be an international law nation-states have to relate concordantly to each other. Article 1 of the Montevideo Convention of 1933 includes in its criteria for qualifying as “a person of international law ... [a] capacity to enter into relations with the other states.”¹⁵ And of course, that convention itself is a creation of states relating to each other. All of which would accord an aptness, as far as international law is concerned, to such phrases as ‘the international community’ and ‘the community of nations’ but, as we saw earlier in the company of Vattel, this is an impossible community. Entirely independent entities cannot relate in and as community. They relate, if at all, in and as a quasi-deific, transcendent communion.

It may be wondered how such self-sufficient entities need have, or even would have, the extensive capacity to recognise each other at all. In the scholarship of international law there are two well-worn yet still warring theories of ‘recognition.’ With the more approved declaratory or evidentiary theory, the

¹⁰ See Schmitt, *supra* note 4 at 101, 126, 129. For the confirmation and the quotation, see Martti Koskenniemi, “International Law in Europe: Between Tradition and Renewal” (2005) 16:1 Eur J Intl L 113 at 114.

¹¹ Bardo Fassbender & Anne Peters, “Introduction: Towards a Global History of International Law”, in Bardo Fassbender and Anne Peters eds, *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012) 1 at 1.

¹² CH Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies, 16th, 17th and 18th Centuries* (Oxford: Clarendon Press, 1967) (he sees international law shrinking to regional dimensions in the nineteenth century. It will continue to be evident that, in this present article, the regional ascription is of a longer duration.)

¹³ Gilles Deleuze & Félix Guattari, *What is Philosophy?*, translated by Graham Burchell & Hugh Tomlinson (London: Verso, 1994) at 45 [emphasis in original]. See also Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press, 2011) at 37, 159 (for international law specifically).

¹⁴ Zygmunt Bauman, *Modernity and the Holocaust* (Cambridge: Polity Press, 1989) at 53.

¹⁵ *Convention on Rights and Duties of States*, 26 December 1933, 165 LNTS 19, art 1 (entered into force 26 December 1934).

nation-state “exists as such prior to and independently of recognition,” recognition then being “merely a formal acknowledgment of an established situation of fact.”¹⁶ Beyond immediate concerns with international law, the self-subsistence of either facticity or of any particular fact is something intensely contested. But, even putting that on one side, there remains the question of how there can be definitive content given to the particular ‘fact’ of something being a nation-state. The sovereign nation-state, in its self-constituted utter distinctness, cannot defer to another authority laying down the criteria for the very recognition of that distinctness. The contrast then with the alternative theory of recognition, the constitutive theory, could not be sharper. With this theory, recognition creates the nation-state in accord with criteria laid down in international law – criteria such as those contained in Article 1 of the Montevideo Convention of 1933. So, nation-states are constituted by an international law which they constitute.

There can be little reticence in an international law that persistently elevates its own surpassing credentials. So, international law’s identifying itself with ‘the international community’ or ‘the community of nations’ is rarely a matter of self-restraint. The same could be said of the burgeoning presence of human rights in international law and the commensurate claims to the human in such as ‘crimes against humanity.’ International criminal law itself can stand apart from the exceptionally limited consensual adherence of states, propound an ‘international legal personality’ and proscribe “‘universal’ or international crimes” – dictates that in practice have “allowed of few or no reservations.”¹⁷ Rules in international criminal law will overlap with the domain of *jus cogens*, that domain of peremptory norms of international law binding on every state whether or not it has agreed to them. In a like vein, there are obligations *erga omnes*, obligations deemed to be “towards all” in that the obligation is one “to the whole of the international community” in requiring, for example, the “enforcing and protecting [of] fundamental human rights.”¹⁸ Furthermore, no matter what the difficulty in theorizing its ‘recognition,’ a “state may exhibit all the hallmarks of statehood yet be denied recognition by other states by reason of the circumstances of its creation offending fundamental norms of the international legal order.”¹⁹

Perhaps the most extensive, if comparatively subdued, claim international law would advance in its self-elevation takes the form of custom. Once seen as the very foundation of international law, custom remains central and pervasive. This is not custom as a mordant stasis. Although typically taken to be derived from the ‘practice’ of states, custom is receptively and continually formative of that practice, and it is selectively transformative in its recognizing practice as juridical rule. The court in effecting these processes of formation and transformation is not limited in its range of enquiry – an enquiry that can extend to, for example, “treaties, the practice of states, diplomatic correspondence, decisions of state courts, and juristic writings.”²⁰ The impact of custom can, in turn, be transformative of other categories of international law such as treaties and decisions of international courts. Here the formative force of custom merges with that of legal interpretation and determination generally where international law routinely manifests its prescriptive elevation, at times spectacularly, so as with the invention and formulation of crimes against humanity.²¹

In all, this engagement with the international of international law seems to have ended in intimations of aporia. Borrowing Carty’s terms, there is “a *void* at the very heart of international society which is marked by the myth of international legal order;” in the result, “there is no legal solidarity on the part of states towards one another.”²² Yet, our engagement went on, international law had a generative force and determinate efficacy that seemed able to fill any such void. En route to resolving this seeming contradiction, the next section looks at attempted appropriations of international law that might be considered able to resolve it.

¹⁶ IA Shearer, *Starke’s International Law*, 11th ed (London: Butterworth & Co, 1994) at 120.

¹⁷ Ilias Bantekas, *International Criminal Law*, 4th ed (Oxford: Hart Publishing, 2010) at 2, 8, 14.

¹⁸ *Ibid* at 13.

¹⁹ Shearer, *supra* note 16 at 87.

²⁰ *Ibid* at 35.

²¹ See Bantekas, *supra* note 17 at 185–88.

²² Anthony Carty, “Myths of International Legal Order: Past and Present” (1997) 10:2 Cambridge Rev Intl Affairs 3 at 10 [emphasis in original].

Appropriation

The history of modern international law and its expansion touched on earlier can be endowed with impelling content by way of Anghie's supplement: "European International law could not have become universally applicable if not for colonialism. Colonialism justified itself as a civilizing mission."²³ That history derived an origin from "rules developed in the European state system since the 16th century."²⁴ More specifically the Hispanic colonization of the Americas in that century is widely seen as providing another yet related origin—the origin of a unitary comprehension of the world vested in Europe, and this not as a matter of perspective only but also as a matter of pending entitlement, an entitlement beginning with "the New World, America, the land of freedom, i.e. land free for appropriation by Europeans."²⁵ That acerbic note provided by Schmitt is reproduced in one of his comments on Vitoria's lectures on the occupation of this New World:

It never occurred to the Spanish monk that non-believers should have the same rights of propaganda and intervention for their idolatry and religious fallacies as Spanish Christians had for their Christian missions.²⁶

Whilst that imperial orientation could hardly be expected to have endured into a post-colonial era, it has. For a start, somewhat literally, former colonies entered an international domain that continued, with only marginal modification, to be amply occupied by an Occident now expanded beyond Europe in the absorption of the United States. This entry was not only a matter of being admitted into international institutions, international law itself remained securely 'in place' commanding adherence. Even those not colonized were admitted on the same terms, or lack of terms, and at times earlier. So, Anghie describes "the arduous task successfully undertaken by Japan" and by some others as one of securing admission to the domain of international law "by changing their social, political, economic and legal systems in such a manner as to ensure that they complied with European standards."²⁷

This particular 'new international law' is one enmeshed, returning to Pope Francis, in "unseen empires" where "uniform systems" are to be realized, not now as the emanation of some imperium, but through generating commonalities of requisite effect—generating an "imperialism of the same," as Levinas may render it, whilst still sustaining an insistent differentiation.²⁸ With this more "informal imperialism," borrowing Tully's depiction,²⁹ those not presently or entirely of the elect are to undergo a process of development oriented towards overcoming that existential deficiency, and to do so by way of a plethora of organizations and, writes Escobar, by way of "an endless number of practices."³⁰ These seek to orient developing nations consensually, yet they do so more intrusively, more intimately, than the modes typical of the prior and more 'formal' imperialisms. Whilst this overall process can assume a large aspirational and programmatic range and secure a wide measure of acceptance, and whilst it adopts systematic and scientific modes of operation, nonetheless it remains effectively diffuse.

This combination of the diffuse with an infra-imperialism is revealed as more explicitly functional when the mantra of development comes to merge with that of a more expansive "governance" and especially so when that governance is filtered through Foucault's "governmentality."³¹ Governance has been:

²³ Antony Anghie, "Law, Concepts of the International" in Thomas Benjamin, ed, *Encyclopedia of Western Colonialism Since 1450* (Detroit: Macmillan Reference USA, 2007) 724 at 727 [Anghie, "Law, Concepts"].

²⁴ Fassbender & Peters, *supra* note 11 at 1.

²⁵ Schmitt, *supra* note 4 at 37.

²⁶ *Ibid* at 113.

²⁷ Anghie, "Law, Concepts", *supra* note 23 at 725.

²⁸ See Pope Francis, *supra* note 5; Immanuel Levinas, *Totality and Infinity: an Essay on Exteriority*, translated by Alphonso Lingis (Pittsburgh: Duquesne University Press, 1969) at 87.

²⁹ James Tully, *Public Philosophy in a New Key: Volume 2, Imperialism and Civic Freedom* (Cambridge: Cambridge University Press, 2008) ch 5.

³⁰ Arturo Escobar, "Discourse and Power in Development: Michel Foucault and the Relevance of his Work to the Third World" (1984) 10 *Alt J* 377 at 387. See also Celine Tan, *Governance Through Development: Poverty Reduction Strategies, International Law and The Disciplining of Third World States* (Abingdon: Routledge, 2011) (more particularly, for an indispensable critical engagement).

³¹ See e.g. Nicholas J Kiersey, Doug Stokes & Jason R Weidner, "Introduction" in Nicholas J Kiersey & Doug Stokes, eds, *Foucault and International Relations: New Critical Engagements* (Abingdon: Routledge, 2011) at xiii.

... often defined as government without readily identifiable governors, and the study of global governance reveals that clear, transparent and hierarchical patterns of authority are typically lacking; indeed, the relative fall from grace of law as a normative order suggests much the same.³²

Leaving the redemption of law on one side for now, governance imports a mixitive collection of processes and organizations that have a singular efficacy, yet do not have a conspicuous coherence, despite which this governance manages to project a systematic inevitability – something enhanced by its assumed factuality, normality and naturalness, by its being the way things are.

This governance can be more revealingly rendered in terms of Foucault's "governmentality," a governing which would combine a pervasive governing of whole populations with tentacular and generalized disciplinary powers, including and especially the governing by, and disciplinary power of, the market.³³ Such governmentality generates "the effect not of a consensus but of the materiality of power operating on the very bodies of individuals."³⁴ And whilst it is identified with a tendency "throughout the West [that] has constantly led toward the pre-eminence over all other types of power – sovereignty, discipline, and so on," the role and force of disciplinary power is preserved, as is the force of a state sovereignty that takes on functional, even heightened significance.³⁵ More expansively, the state serves in bringing to bear a "liberal reason ... established as self-limitation of government on the basis of a 'naturalness' of the objects and practices specific to government" including a naturalness of the economic.³⁶ Still in this expansive vein, and like its vaporous cousin "global governance," this naturalness characterizes an "economic world" that is "naturally opaque and naturally non-totalizable."³⁷ Thence no focal totality and no positive bound that could delimit it, even as a blank naturalness, can be called on to do so. Yet, "the form of governmental technology we call liberalism ... [has] its own self-limitation" as its objective.³⁸ Liberal governmentality, then, assumes an illimitable capacity of self-limitation. This fusion of the illimitable with the limitable enables "the delimitation of phenomena within acceptable limits."³⁹ And that illimitable range would extend to delimiting what is beyond the domain of what the self-limited may be at any one time – such as delimiting the underdeveloped of the earth.

No matter what the ability of governmentality to 'manage' the relation between the illimitable and the delimited, that ability does not seem capable of endowing international law with a comprehensively cohering force or identity, much less with authority. Governmentality, like informal imperialism and governance, eludes any positively encompassing identity. In that way, its embedding of empire remains 'unseen' and its putatively liberal, modern and post-imperial qualities are shielded from complicity. Further, with its immanent illimitability not tied to any positively encompassing identity, governmentality also eludes the transcendence deduced by Deleuze and Guattari and recounted earlier: "whenever immanence is interpreted as immanent *to* Something, we can be sure this Something reintroduces the transcendent."⁴⁰ Or at least almost eludes. Law is essential to liberal governmentality, and this is a law, whether national or international, generated considerably by national sovereigns.⁴¹ The state itself, as we

³² Jan Klabbbers & Touko Piiparinen, "Normative Pluralism: An Exploration" in Jan Klabbbers and Touko Piiparinen, eds, *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge: Cambridge University Press, 2013) 13 at 28.

³³ Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978*, translated by Graham Burchell [Foucault, *Security*] (Houndmills: Palgrave Macmillan, 2007) 104, 108–09 (in the account that follows Foucault's work on biopower is drawn on as integral to governmentality even though it seems he did not explicitly connect the two).

³⁴ Michel Foucault, "Body/Power" in Colin Gordon, ed, *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, Michel Foucault, translated by Colin Gordon et al (Brighton: The Harvester Press, 1980) 55 at 55.

³⁵ Foucault, *Security*, *supra* note 33 at 108–09.

³⁶ See Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979*, translated by Graham Burchell (Houndmills: Palgrave Macmillan, 2008) at 21–22 [Foucault, *Biopolitics*]; see also *ibid* at 297.

³⁷ *Ibid* at 282.

³⁸ *Ibid* at 297.

³⁹ Foucault, *Security*, *supra* note 33 at 66.

⁴⁰ Deleuze & Guattari, *supra* note 13 at 45.

⁴¹ See Foucault, *Biopolitics*, *supra* note 36 at 294–297. And see generally Ruth Buchanan & Sundhya Pahuja "Law, Nation, and (Imagined) International Communities", in Revathi Krishnaswamy and John C Hawley eds, *The Postcolonial and the Global* (Minneapolis: University of Minnesota Press, 2008) 261 at 262 [Buchanan & Pahuja, "Imagined, International Communities"]; Ben Golder & Peter Fitzpatrick, *Foucault's Law* (Abingdon: Routledge, 2009) at 33–35, ch 2.

saw, is involved in the managing of governmentality and provides, if elusively, the formative force of international law. In so doing, it stakes its own claim to illimitability.

Even more to the point, the national sovereign is self-constituted as illimitably immanent to itself as a delimited ‘something.’ It is caught in Deleuze and Guattari’s aperçu. Or, more bluntly and with Derrida, the sovereignty of the nation state remains “a theological inheritance.”⁴² Obviously, with the sovereign state being integral to a secular modernism, its deific dimension cannot be explicitly acknowledged, no more than there can be an explicit acknowledgement of that transcendent communion of sovereign states which would, as we saw earlier, be needed to form international law. In all, governmentality becomes an impasse and a puzzle. As impasse, it is of a secular modernity, yet integrally dependent on deific substitutes. With the puzzle, it subsists as a nominate efficacy, yet lacks any compendiously positive presence.

Resolution – negation

In all, not only are the unseen empires of governmentality unable to account for the positive coherence of international law, they also remain tied to the impossibility of extracting a modern, secular presence of international law from formations of the sovereign state. Yet, each of the trio of governmentality, the sovereign state and international law assumes an operative coherence even as its assumption of a singular, positive presence remains impossible or incoherent. Perhaps then, such an assumption comes operatively from a presence negatively generated. That proposition signals a wider argument about the formation of an occidental modernism by way of a negative universal reference, but international law itself evokes a commensurate history of that reference.⁴³

It is at this point that Vitoria re-enters. The once subdued recognition of Vitoria as originating international law is changing to become something closer to primal.⁴⁴ Vitoria, as we saw, subscribed to the universality of the *ius gentium*, and he did so in a way that would include “the American Indians.”⁴⁵ Yet, the all-inclusiveness of the *ius gentium* came with the utter exclusion that could be imperially visited on non-compliance by these Indians with some of its supposed tenets – excluded to the point of their elimination.⁴⁶ This was a relation in which the *ius gentium* was not transformed into a *ius inter gentes*. Despite his vaunted concern for these Indians, Vitoria had “no doubt that force of arms were necessary for the Spaniards to maintain an imperial presence,” and not least so because of innate deficiencies of “the barbarians.”⁴⁷

There has to be, however, some hesitation in seeing Vitoria as elaborating “a new, secular, international law” even where that international law emerges as an imperial construct.⁴⁸ Vitoria is indeed often hailed as secular and modern, yet he is also and often found to be resolutely religious and theological, and one of his main justifications for imperial appropriation was religious.⁴⁹ Yet further, there is much to indicate that Vitoria occupies both sides of this apparent divide. Whilst Vitoria adhered comprehensively to the tenets of scholastic theology, including the supremacy of divine law, still for him the *ius gentium*, derived from Roman law, “has the validity of a positive enactment” – enacted by “[t]he whole world, which is in a sense a commonwealth,” and resulting in a law that “[n]o kingdom may choose to ignore.”⁵⁰ And whilst a kingdom can be a “perfect community ... one in which nothing is lacking,” a

⁴² Jacques Derrida, *Paper Machine*, translated by Rachel Bowlby (Stanford: Stanford University Press, 2005) at 105.

⁴³ See generally Peter Fitzpatrick, “Foucault’s other law” in Ben Golder, ed, *Re-reading Foucault: On Law, Power and Rights* (Abingdon: Routledge, 2013) 39 at 46–49; Buchanan & Pahuja, “Imagined, International Communities”, *supra* note 41 at 464.

⁴⁴ That origin could range more widely than it is usually taken: see Martti Koskenniemi, “Empire and International Law: The Real Spanish Contribution” (2011) 61:1 UTLJ 1 at 2.

⁴⁵ Francisco de Vitoria, “On the American Indians (*De Indis*)” in Anthony Pagden & Jeremy Lawrance, eds, *Vitoria: Political Writings*, (Cambridge: Cambridge University Press, 1991) 231 at 283–82, 285–86 [Vitoria, “On the American Indians”].

⁴⁶ *Ibid* at 282–83, 285–86, 291–92.

⁴⁷ *Ibid* at 286, 290–91.

⁴⁸ Cf Anghie, *Imperialism*, *supra* note 4 at 28.

⁴⁹ See Anthony Pagden & Jeremy Lawrance, “Introduction” in Pagden & Lawrance, *supra* note 45 at xiii–xv. See also Stuart Elden, *The Birth of Territory* (Chicago: The University of Chicago Press, 2013) at 14. See as well the striking instance provided in Anthony Pagden, *The fall of natural man: The American Indian and the origins of comparative ethnology* (Cambridge: Cambridge University Press, 1982) at 7–8.

⁵⁰ Francisco de Vitoria, “On Civil Power” in Pagden & Lawrance, *supra* note 45 at 40.

formula that aptly accommodated the already formed ‘sovereign’ states of Europe, still “the power of the sovereign clearly comes immediately from God himself, even though kings are created by the commonwealth.”⁵¹ And, a final; instance, whilst Vitoria in several ways resisted papal authority, his commitment to Catholicism was unwavering.⁵²

Unlike the monistic modern, Vitoria had the ‘mediaeval’ capacity to accord ultimate but related, even contesting, sources of power to “the Church” and to the “civil and lay.”⁵³ As for law, much of the mediaeval period was characterised by a deep affinity between it and theology, an affinity in which the theological assumed an ostensible dominance. Yet, the very inability of “human law” to “contradict divine law,” as Ullmann observes, serves to explain “why law in the Middle Ages assumed so crucial and overriding a role...”⁵⁴ As “the prime vehicle by which government was to be exercised,” law could relate to a large responsive range by way of its “openness,” an openness needed because:

in order to accommodate a great many divergent social systems the law had to manifest a corresponding flexibility so that it was if necessary, capable of absorbing alien matter. This capacity for absorption was particularly necessary in regard to non-Christian elements and usages.⁵⁵

Such law, Grossi would observe, was an “integrated plurality,” one in which law was “both unified and, at the same time, plural” – a feat that will be engaged with a little later.⁵⁶ This mediaeval law, responsive and plural, “became the most crucial and vital element of the whole social fabric.”⁵⁷

Such a law could hardly be the torpid, ‘tradition’-tied entity so readily taken to characterize it. Nor could the society so closely tied to such a law suffer from the pervasive stasis routinely attributed to it. The mediaeval did not stop at some point and the modern supervene. Rather, there were numberless and “real ... continuities.”⁵⁸ To take a key instance, whilst secularism is exalted as modern in its rejection of a religious Middle Ages, the mediaeval was both religious and secular – qualities combined, yet also held distinct.⁵⁹ Further arrogations of the mediaeval can be extracted from another ‘origin’ of international law, one of an even more established variety than that offered by Vitoria, the Peace of Westphalia of 1648.

As a contribution to the modernist mantra, Westphalia (to use the customary abbreviation) is hailed as the precipitate origin of a modern state system, and not only of the modern, secular states, but also of the international law linking them. Crucially, as Koskenniemi notes, this society of independent states “would now arise from itself and not from any religious, moral or political notions of the good external to it.”⁶⁰ That marvellous rising came from the constitutive rejection of an utter dependence on the religious and such foisted on mediaeval. Such self-elevation, Koskenniemi would add, embodied “the founding myth of the system,” and by now many studies have identified this mythic, fictive quality and revealed something of the opposite, revealed a dependence of such other “notions,” including the religious, as well as essential continuities with the mediaeval.⁶¹ In more condign terms, the conventional Westphalia becomes ‘history’ but as a retrospective and transcendent attribution, as a modernist history which, as Foucault would see such history, takes on “a suprahistorical perspective: a history whose

⁵¹ *Ibid* at 16; Francisco de Vitoria, “Four Letters on Political Matters” in Pagden & Lawrance, *supra* note 45 at 301.

⁵² See e.g. Vitoria, “On the American Indians”, *supra* note 45 at 259–61.

⁵³ Francisco de Vitoria, “I On the Power of the Church” in Pagden & Lawrance, *supra* note 45 at 50.

⁵⁴ Walter Ullmann, *Law and Politics in the Middle Ages: An Introduction to Sources of Medieval Political Ideas* (Cambridge: Cambridge University Press, 1975) at 46.

⁵⁵ *Ibid* at 48, 49.

⁵⁶ Paolo Grossi, *A History of European Law*, translated by Hooper Laurence (Malden MA: Wiley-Blackwell, 2010) at 35, 37.

⁵⁷ Ullmann, *supra* note 54 at 28.

⁵⁸ See Constantin Fasolt, *The Limits of History* (Chicago: The University of Chicago Press, 2004) at 33. See also *ibid* at 21 for further context.

⁵⁹ See Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983) at 89–91, 111–13, 292–93.

⁶⁰ Martti Koskenniemi, “What Is International Law For?” in Malcolm D Evans, ed, *International Law*, 3rd ed (Oxford: Oxford University Press, 2010) 32 at 33.

⁶¹ *Ibid*. See generally Peter Fitzpatrick, “Taking place: Westphalia and the poetics of law” (2014) 1:2 London Rev Int Law 155 (what follows is drawn from this work, or more accurately, derived from the sources as discussed there).

function is to compose the finally reduced diversity of time into a totality fully closed upon itself.⁶² Or, in Latour's more mellifluous terms, history as "a fine laminary flow," a "beautiful order," drawn out of and away from what is "a turbulent flow of whirlpools and rapids."⁶³

The outcome can be encapsulated in a continuity with the mediaeval, in the mediaeval conception of empire or Empire, a conception that invested the sovereign with imperial authority.⁶⁴ With modernity, that authority is absorbed into a heightened territoriality which, as we also saw earlier, typifies the state, this being a "territorial order" which "became representative of a new order in international law."⁶⁵ This incorporation of the illimitably imperial into the territorially delimited provides, by way of a return to Deleuze and Guattari, an instance of that transcendence generated "whenever immanence is interpreted as immanent to Something."⁶⁶ This "sublimation of theology in the 'world,'" as Kathleen Davis most aptly has it, is effected by "a political-theological tear" typified by the rupture between the mediaeval and the modern, a rupture "that paradoxically occupies a transcendent position by virtue of banishing transcendence."⁶⁷ Even as that rupture serves to found a diversity of sites of power, these still operate as an imperium attuned to uniform effect. The dictates of 'development,' for example, are not attuned to diversity. The puzzle then becomes how that uniform effect is affirmed given the diffusion and elusion of its constituent powers.

Once the reliance on a focussed theological reference is no longer available explicably, the universality of the modern must be derived from elsewhere. That need is not met by the international order, or disorder, observed earlier. Not only was it found to be diffuse but, as rendered in Foucault's terms, it would be characterised by plural modes of power that were "indefinite," "without limit," "never closed," or "naturally opaque and naturally non-totalizable."⁶⁸ Vitoria again obliges, at least in significant part. The *ius gentium* for Vitoria was both inclusive and exclusive. It included the barbarians but, as *ius inter gentes*, it excluded them. This seeming contradiction was, in a sense, resolved by holding out the prospect of inclusion, a remote redemption dependent on suitable transformations such as conversion to Christianity. Vitoria was, however and understandably, able to ascribe a largely religious dynamic to that combined process. The modern expedient is to adopt a like process as itself providing the dynamic, and to do so by way of that negative universal reference signalled at the outset of this present section.

A sampling of international law's copious contributions to this negative universal reference could begin with the return to the standard-issue origin of Westphalia. From the point of its retrospective formation, one could observe with Walker that the "founding mythology" of Westphalia marked "a moment at which another world was ordained in opposition to" the modern; "a world, in part, deemed bereft of civilization and thus legitimately subject to colonial exploitation..."⁶⁹ The origin thence "repeat[s] itself originarily" by being set in a spatially realized universal constituted in the opposition to all that is deemed other to it, the content of a universal derived by its being not what the other is or by being what the other is not.⁷⁰ There is, however, a pivotal aporia intrinsic to this situated universal which impels the negative reference beyond exclusion. Whilst an appropriated universal excludes utterly, still the universal has to be all-inclusive. Accounts of international law equating it with the civilized provide an indicative instance of both exclusion and inclusion. With the marker of civilization, there is historically both an overlap between, and a shift from, civilization as denoting absolute difference and civilization as the standard of a condition to be achieved by the excluded through 'improvement' or, later and constantly in

⁶² Michel Foucault, "Nietzsche, Genealogy, History" in Donald F Bouchard, *Michel Foucault: Language, Counter-memory, Practice*, translated by Donald F Bouchard & Sherry Simon (Ithaca, NY: Cornell University Press, 1977) 139 at 152.

⁶³ Bruno Latour, *We Have Never Been Modern*, translated by Catherine Porter (Cambridge, MA: Harvester Wheatsheaf, 1993) at 72–73.

⁶⁴ See Berman, *supra* note 59 at 66–67, 75, 89; Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge: Cambridge University Press, 2010) at 288.

⁶⁵ Schmitt, *supra* note 4 at 129ff.

⁶⁶ Deleuze & Guattari, *supra* note 13 at 45.

⁶⁷ Kathleen Davis, *Periodization & Sovereignty: How Ideas of Feudalism & Secularization Govern the Politics of Time* (Philadelphia, PA: University of Pennsylvania Press, 2008) at 18, 84.

⁶⁸ Michel Foucault, *Discipline and Punish: The Birth of the Prison*, translated by Alan Sheridan (Harmondsworth: Penguin, 1979) at 227; Foucault, *Biopolitics*, *supra* note 36 at 282.

⁶⁹ RBJ Walker, *After the Globe, Before the World* (London: Routledge, 2010) at 131–32.

⁷⁰ The quoted phrase comes from Jacques Derrida, "Force of Law: The 'Mystical Foundation of Authority'" translated by Mary Quaintance, in Gil Anidjar, *Acts of Religion: Jacques Derrida* (New York: Routledge, 2002) 230 at 277—78.

the discourse of international law, by way of “progress.”⁷¹ There is also, and eventually, a further shift from progress as an exemplary imperative to its becoming “disciplinary,” a formative and “controlling” discourse.⁷² Progress in this guise merges into a ‘development’ characterized by tentacular regulation.⁷³ And in taking elevated content from its being the contrary of underdevelopment, development typifies the negative universal reference by elevating a universal norm through “the creation of “abnormalities” such as the “underdeveloped,” ... which it would later treat and reform.”⁷⁴ That underdevelopment, as traced earlier, comes to merge with regimes of ‘governance’ and governmentality, regimes to do with security, with finance and investment, trade, and much more.

With this culmination, the disciplinary norm generalized through governmentality also comes to bind the elect, and it does so even as the norm remains constitutively attuned to them. Formative concepts of, or brought to bear on, international law now adopt something of a positive universality, yet still avoid confronting the secular imperative by sharing an invented facticity.⁷⁵ Such a concept is denied ultimate attribution and “tends to become anonymous in order to attest to a truth imprinted in things.”⁷⁶ Drawing on the repertoire already mentioned, the ‘human’ of human rights, the ‘community’ of the international community, along with ‘progress’ and ‘development’ as processes, all become ordered and ordering facts.

Given their burgeoning in international law, human rights can provide a summary instance ending this section. For Pagden, human rights are an “imperial legacy” functioning with a supposed international community “which is, in essence, a secularized transvaluation of the Christian ethic, at least as it applies to the concept of rights.”⁷⁷ For Hopgood, the “humanism” that is “(the cultural precondition for Human Rights) ... was a secular replacement for the Christian god.”⁷⁸ In being abundantly set within international law against the inhuman, the ‘human’ of human rights derives conceivable content from negation whilst still being inclusively universal. By way of such negation, this ‘human’ can avoid any positive imperial or theological ascription, an avoidance secured in the evasive facticity of the human.⁷⁹ Yet, even as the negative universal reference can generate and affect international law and governmentality, it does not positively secure a coherent identity or an enforceability for either.

Resolution: positive

The semantic search for the “inter-” at the outset saw that it denoted being “[b]etween or among other things or persons; between the parts of, in the intervals of, or in the midst of, something; together *with*,” a being “with each other; mutually and reciprocally.”⁸⁰ A further search may situate this “something” within our present concerns. A plurality can be a simple plurality – a term denoting more than one, many – but the prime meaning given to “plurality” in the *Oxford English Dictionary* is “[t]he state of being plural; the fact or condition of denoting, comprising, or consisting of more than one.”⁸¹ This condition, this consisting and relating in and as a plurality, would for Donald Davidson “make sense ... only if there is a common coordinate system on which to plot” the different entities relating plurally, “yet the existence of a common system belies the claim to dramatic incomparability.”⁸² This, however, is a compliant commonality which accommodates a seeming paradox of plurality. If, say, entities are to relate in and as a

⁷¹ For a stark example of exclusion see “John Westlake on the Title to Sovereignty” in Philip D Curtin, ed, *Imperialism* (London: The Macmillan Press Ltd, 1972) 45 at 47. See generally for progress Thomas Skouteris, *The Notion of Progress in International Law Discourse* (The Hague: TMC Asser Press, 2009).

⁷² *Ibid* at 163, 222–26.

⁷³ See Ruth Buchanan & Sundhya Pahuja, “Legal Imperialism: *Empire’s* Invisible Hand?” in Paul A Passavant and Jodi Dean eds, *Empire’s New Clothes: Reading Hardt and Negri* (New York: Routledge, 2004) 73 at 73.

⁷⁴ Escobar, *supra* note 30 at 387.

⁷⁵ The element of ‘invention’ here is derived precipitately from Alasdair MacIntyre, *After Virtue: a study in moral theory* (London: Gerald Duckworth, 1981) at ch 7.

⁷⁶ Claude Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (Cambridge: Polity Press, 1986) at 203

⁷⁷ Anthony Pagden, “Human Rights, Natural Rights and Europe’s Imperial Legacy” (2003) 31:2 *Political Theory* at 171, 173.

⁷⁸ Stephen Hopgood, *The Endtimes of Human Rights* (Ithaca, NY: Cornell University Press, 2013) at x.

⁷⁹ See generally Pagden, *supra* note 77 at 172.

⁸⁰ *Oxford English Dictionary*, *supra* note 2 *sub verbo* “inter-, prefix.”

⁸¹ *Ibid*, *sub verbo* “plurality.”

⁸² Donald Davidson, “On the Very Idea of a Conceptual Scheme” in John Rajchman and Cornel West, eds, *Post-Analytic Philosophy* (New York: Columbia University Press, 1985) 129 at 130.

plurality in the sense of a being-together plurally, then the element in commonality cannot be only within each of them because this would leave them as a simple plurality, leave them in dissipation. So the commonality has to be, and be set, in some way determinately apart from them. Yet the determinate commonality cannot be so much apart from them in their singularity that it ceases to relate responsively to them – ceases constitutively to absorb their changeful commonality. This commonality, then, is generated in yet another aporia. It has to be capable of vacating itself and changing in this responsiveness whilst enabling some determinate manifestation apart from itself. Even as that manifestation is enabled, it does not and cannot assume an invariant, much less comprehensive, hold on the commonality. And what is manifest will always be partial and contingent on the ultimate plurality with-in the commonality.

Returning then to the engagement with governmentality, whilst its illimitability would be compatible with and sustained by the commonality with-in its plurality of sites of power, and even as its liberal and developmental dimensions involved some cohering of these diverse powers, still its operative existence entailed its not taking on an extensively generalized manifestation, much less some encompassing imperium. How then might it assume an operative connectivity and cohesion? To have a “common coordinate system,” to have an operative plurality, there has to be cohering connections between the entities relating plurally.⁸³ That connection and cohesion can be provided by law. Returning to Foucault, the sites of power with-in governmentality and its sustaining disciplinary powers are linked through law as a commonality endowing them with form and force.⁸⁴

Yet, if this law is to contribute the positive resolution being sought in this section, closer inspection could question whether it can resolve anything at all. The issue is posed in this much-quoted passage by Koskenniemi:

We have either chosen a formalism that insists on the law’s validity and binding nature irrespective of its distance from the world of political facts — or we have become realists and stressed the law’s dependence on political facts and ridiculed “binding force” as a formalist fiction.⁸⁵

That impasse courses through Jurisprudence as a discipline but, being necessarily abrupt about it, the resolving response here is that in, and as, law each position is necessary for the other. There is an inescapable point to the realists’ case. Law’s efficacy depends upon its receptive regard for what is ever beyond it. Yet, that responsiveness cannot be confined to “political facts” or indeed to any other avatar. Admittedly, and as we saw, international law could be reduced to, for example, European dimensions or the dimensions of a particular ‘community.’ And as for dominance effected through governmentality, this is vividly echoed in the influential perception that international law is now saturated by managerialism.⁸⁶ Yet, even as necessarily abject, this law has to match, extend ever beyond, and delimit the illimitable, the non-totalizable quality of governmentality its constituent powers. Here, international law has to be at a “distance” from its sources, positioned apart in something of a distinct, self-sustaining “formalism.” If, in a realist perception, governmentality were somehow to subsume law comprehensively, it would need to subvert its own essential indefiniteness and take on a conspicuous coherence.

Seeing law in and as plurality may heighten and serve to generalise the significance of the link between formalism and realism. This could be done by evoking another continuity with the mediaeval – this time that of its law. That law was an “integrated plurality” in which it was “both unified and, at the same time, plural.”⁸⁷ Such a competence, as we saw, enabled law’s being open and receptive to radically divergent entities. That process, it could now be argued, in drawing on an ever incipient commonality, combined a realist involvement with a diversity and a formalist distancing apart from it. In this way, law endowed the commonality as diversity with determinate effect. Understandably enough then, law in the Middle Ages was accorded a “prime” governmental determinacy, “an over-riding ... role.”⁸⁸

⁸³ *Ibid.*

⁸⁴ Michel Foucault, “*Society Must Be Defended*”: *Lectures at the Collège de France, 1975-76*, translated by David Macey (London: Penguin, 2003) at 252–53; Foucault, *Biopolitics*, *supra* note 36 at 296; Golder & Fitzpatrick, *supra* note 41 ch 2.

⁸⁵ Martti Koskenniemi, “International Law in a Post-Realist Era” (1995) 16 *Australian YB Intl L* 1 at 4.

⁸⁶ See Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge: Cambridge University Press, 2013) at 14–17, 216–18.

⁸⁷ Grossi, *supra* note 56 at 35, 37.

⁸⁸ Ullmann, *supra* note 54 at 46, 48.

Another return to the beginning: the “inter-” of international law may now help account for the surpassing force of that law. “[S]omething” that is “between the parts of, in the intervals of, or in the midst of” could now be seen as the commonality in and as plurality.⁸⁹ This commonality takes on a manifest determinacy, yet ever extends responsively beyond any determining domain. So, international law, as we saw, in many ways extended beyond its standard source in the delimited concordance of sovereign states. Returning to just one instance by way of illustration, the imperative force of *jus cogens* is intrinsic and cannot be countered by nation-states.

Resistance

It may seem a little late to be coming to a focal concern of this essay, but perhaps it will become evident that the whole exercise was oriented towards resistance. We have encountered two types of resistance.

In what could be called the law implicate, and relating it integrally to governmentality, law gives determinate effect to the constituent powers of governmentality, both singularly and in some cohering relation. To do so it has to match the illimitability of those powers and of governmentality itself. As illimitable, this law embeds the possibility of resistance. The insistent realist may contend that, nonetheless, such law remains in thrall to governmentality, but that would be to ignore the intrinsic force of what could be called the law resistant. International law, in its alignment with a commonality of the ultimately plural, cannot be finally reduced to any source, even as it functions to give a source determinate effect.

Likewise with international law conventionally. It derives constitutional content from nation-states, yet ranges illimitably beyond that derivation, refusing subordination to it. Whilst that protean competence opens out to the possibility of resistance through international law, there is still an operative filtering through its existent constitution. Even so, international law still opens onto the prospect, borrowing from Derrida and his contributing a final ‘something,’ a prospect of “something which would go beyond the current stage of internationality, perhaps beyond citizenship, beyond belonging to a state, to a given nation state.”⁹⁰

⁸⁹ *Oxford English Dictionary*, *supra* note 2 *sub verbo* “inter-, prefix.”

⁹⁰ “The Villanova Roundtable: A Conversation with Jacques Derrida” in John D Caputo, ed, *Deconstruction in a Nutshell: A Conversation with Jacques Derrida* (New York: Fordham University Press, 1997) 3 at 12.