

The 'Clash of Civilizations' in International Law

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WOUTER WERNER, APR 25 2018

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Sometimes international law and international relations are two worlds apart. When Samuel Huntington published his article and book 'The Clash of Civilizations' in 1993 and 1997, it made quite a splash in the field of International Relations. The piece was discussed and critiqued intensively at the time, and as this special issue attests, after more than 20 years his work is still considered worth discussing, exploring and critiquing. On the other side of the disciplinary divide, things looked quite different. While Huntington's thesis was certainly noticed in international law (Rehman 2005), his impact on international scholarship more broadly was modest, to say the least. References to Huntington's work are often made more in passing and generally not with the aim of a serious engagement with his work.^[1] Conversely, international law is almost completely neglected in Huntington's work. It is hardly mentioned at all, apart from incidental remarks such as 'Western law coming out of the tradition of Grotius' (Huntington 1997, 52) (without explaining what this entails exactly) or it is equated with Western ideas about governance and human rights.

In this (brief) article, I will focus on the possible contribution of international law to the debates and critiques on the 'clash of civilizations'. More particularly, I will argue that a more in-depth engagement with international law would enrich the debate on the 'clash of civilizations' for at least two reasons.

First, international law could help to explore the performative effects of claims about 'clashing civilizations'. For Huntington, the thesis of the 'clash of civilizations' is meant as a diagnosis of the post-Cold War world; as an explanatory frame that competes with other approaches in International Relations such as realism.^[2] In other words: Huntington presents his claim as if it deals with an object that is external to it. However, it is difficult to maintain this strict separation, especially if the speaker is part of the society that (s)he describes. In that case, statements about the 'nature' of a society come with normative consequences. For example, for someone who conceives of one's society as composed of egoistic individuals, the normative ties to others are different than for someone who holds that society is rooted in common fate and pride.^[3] Somewhat paradoxically, this insight is at the heart of Huntington's diagnoses of different civilizations, but it is not applied to his own position.

For (international) lawyers, going back and forth between descriptive and performative aspects of 'society' is quite common. Take for example the structure of the (in)famous 1927 *Lotus* judgment of the Permanent Court of International Justice (PCIJ). The PCIJ was called to decide whether Turkey enjoyed jurisdiction to try a French officer who failed his duty to prevent a collision between a French and a Turkish ship on the high seas. In order to answer this question, the PCIJ postulated what it regarded as the nature of international legal society at the time: 'International law governs relations between independent states'. From this characterization it followed, according to the Court, that 'the rules of law binding upon states therefore emanate from their own free will (...); restrictions upon the independence of states cannot therefore be presumed' (*Lotus case* [1927], p18). In other words, the concept of 'society' functioned as an institutional fact, linking the apparent 'is' of the existence of sovereign states to the 'ought' of their legal freedoms. The case of *Lotus* is just one example of courts and tribunals postulating the nature of (international) society as the foundation of normative ties existing between the members of that society.^[4]

Secondly, international law seems an obvious starting point to reflect on clashing civilizations. After all, modern

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international law was to a large extent born out of such clashes, and developed into a system that defined and stratified 'civilizations' for centuries. One of the core questions that occupied the minds of early modern thinkers in international law concerned the treatment of radically different civilizations by European, colonizing powers. As I will set out in section one, international law developed into one of the tools employed by colonial powers to label, categorize and manage differences and clashes between (postulated) civilizations. In section two I will set out how international law tried to overcome its colonial heritages in the twentieth century through the adoption of a protective conception of sovereignty as well as a core of cosmopolitan norms that were supposed to transcend nations and civilizations. The net result, as I will argue in section three, is that international law now offers possibilities to conceptualize world politics in radically different ways, including clashes of civilizations, relations between sovereigns and the regulation of issues of universal nature. Through a brief discussion of the controversies between the African Union and the International Criminal Court I will illustrate how these three are mobilized in concrete cases. Huntington's work functions as a reminder, and warning signal, that such mobilizations remain possible within international law. While it may be true that any invocation of 'civilization' rests on shaky empirical foundations, the consequences of such invocations are too real to be ignored.

From Vitoria to the Standard of Civilization

For modern international law, the idea that civilizations may clash goes back at least to the early 16th century. Just a cursory look at the title of one of the canonical texts of early modern international law shows how much the rise of international law had to do with civilizations in conflict. The reflections on the law of war by Francisco de Vitoria (1483–1546) bore the title, 'on the Indians; or the law of war made by the Spaniards on the barbarians'.^[5] The core question informing Vitoria's teachings on the subject was whether the Spanish crown enjoyed the right to wage war upon a radically different, 'barbaric' civilization. While Vitoria is rightly praised for his critical and cosmopolitan ethos throughout, his work was also characterized by some core differentiations between European and Native American civilizations, and an obvious bias in favor of the right to travel, trade and preach on the part of the Spaniards.^[6]

In the following centuries, international law only deepened the divisions between 'Western' and 'other' civilizations. Or, to be more precise: it more and more presented Europe/the West as 'civilized' and other parts of the world as either uncivilized or barbaric. The heyday of these differentiations was in the nineteenth and early twentieth century, when disciplines such as anthropology and ethnology provided an allegedly scientific basis for legal differentiations between cultures. The British international lawyer Lorimer, for example, identified three concentric zones of humanity: civilized humanity, barbarous humanity and savage humanity; each with a descending level of legal recognition (2005, 101). Even when international lawyers voiced their concerns about the way in which the colonial enterprise was conducted and spoke out on behalf of colonized communities, it remained exceptional to find fundamental critiques of the idea that different stages of civilization came with different legal entitlements.^[7] Legal relations between civilized powers were regulated by rules that were different from the rules that regulated the interaction with Islamic nations. As Wheaton (1836, 51) put it: 'The international law of the civilized, Christian nations of Europe and America, is one thing; and that which governs the intercourse with the Mohammedan nations of the East with each other and with the Christian, is another and very different thing'.^[8] Relations between colonial powers and native communities remained largely outside the sphere of positive international law, and were governed by a core set of rules of natural law (to be interpreted and applied mainly by those in power). The club of 'civilized nations' was exclusive, but not completely closed. There was a possibility for newcomers to enter, if they managed to pass the so called 'standard of civilization' test, a rather indeterminate standard used by Western powers to negotiate their position vis-à-vis states such as Turkey or Japan.^[9] Remnants of the idea that international law is a matter of 'civilized nations' can still be found in the Statute of the International Court of Justice, which is, according to article 38, empowered to apply the 'general principles of law recognized by civilized nations'.

This (too) brief historical sketch shows that the use of terms such as 'civilization' tends to come with stratifications and hierarchies. In the history of international law, 'civilization' has generally been invoked to create an inferior 'other' and to plea for unequal rights between the core and the periphery. While the use of terms such as 'civilization' came with a flavor of scientific objectivity, in fact it functioned as an ideological framework to justify structures of domination.

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Clashes of Civilization in an Era of Formal Equality

Today, the invocation of 'civilizational differences' has not disappeared. Several authors, including Samuel Huntington^[10], have argued that new standards of civilization have emerged in the name of human rights, security, democracy, rule of law or international trade and investment law.^[11] Interestingly however, most of the time, such references to reborn 'standards of civilization' are made to *critique* the direction of international law. The underlying assumption is mostly that equality between nations and cultures should be the norm, but alas, international law is still far removed from this ideal. In other words: if someone argues that something like a 'standard of civilization' drives a legal regime, this is almost invariably done in an attempt to show the illegitimacy of the regime in question; not to justify it.^[12]

This turn-around reflects an important development in international law more generally. In the course of the twentieth century, the formal division of the world into spheres of civilization was replaced by a new interpretation of what sovereign equality of nations entailed. International law rapidly changed its stand towards colonialism, arguing for a right to self-determination of colonized peoples instead.^[13] Newly independent states born out of decolonization were protected by a conception of sovereignty that differed significantly from its nineteenth century counterpart. Sovereignty no longer meant the prerogative to decide when it was necessary to wage war, but instead meant that states were formally protected against intervention and the use of force by their peers.^[14] In other words: sovereignty moved from a freedom to wage war towards a freedom against armed interventions (Aalberts & Werner, 2008). At the same time, post-1945 international law adopted norms with universal pretensions to an unprecedented degree, e.g. in the form of human rights law, regimes to protect areas such as Antarctica or outer space, or norms regulating behavior in times of armed conflict. These norms claim to go beyond the specific interests of states or the values held by different cultures. Instead, they are meant to protect interests of humankind as such, or to embody values that make it possible for nations and cultures to co-exist in the first place.

This is not to say that formal equality between sovereigns or the protection of individual rights and communal interests has completely set aside the logic of civilizational differences. International law is also still characterized by formalized inequalities between states and regions in the world, e.g. in the composition of the Security Council or the distribution of voting rights in some international forums (Simpson 2004). In addition, the application of universal norms is still affected by unequal power relations, so that some states are more likely to be called to account for violations of international norms than others. As a result, international law today offers different normative vocabularies that can be mobilized to conceptualize political struggles and societal problems. Alongside the vocabularies of formal sovereignty and universal values, there is a vocabulary of empire and domination of one 'civilization' over another. As I argued in the first section, the use of such vocabularies should not be treated (only) as if they are truth claims. They are also presentations of the nature of international relations, including the presentation of its main subjects and the normative ties that exist between those subjects. In the last section I will illustrate the mobilization of competing presentations of international society through a discussion of the struggles between the African Union and the International Criminal Court.

The International Criminal Court and 'Africa'

According to Huntington in 1996, Africa possessed a weak civilizational identity at best. He added, however, 'Africans are also developing a sense of African identity, and conceivably sub-Saharan Africa could cohere into a distinct civilization, with South Africa possibly being its core state' (Huntington 1997 47).

Whatever one may think of the descriptive and predictive value of both statements, attempts at developing an African identity have been made by diplomatic elites since the end of the Cold War. In this context, the International Criminal Court (ICC) has proven a useful point of reference to develop such an identity. Initially, the ICC fitted well in the change of identity that came with the death of the Organization of African States (OAS) and the birth of its replacement, the African Union (AU). Where the OAS revolved around issues of decolonization and adopted non-intervention as the core principle among African states, the African Union openly embraced, at least formally, constitutional government, democracy and human rights and allowed for intervention in cases of unconstitutional changes in government or gross human rights violations.^[15] The African Union thus was more than a practical

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arrangement between states; it also constituted an attempt to redefine the nature of the relations between African states and peoples. In line with this ethos, more than 30 African states decided to join the newly established International Criminal Court (ICC).

At first sight, the ICC has a clear cosmopolitan outlook, epitomized by its commitment to fight crimes that 'deeply shock the consciousness of humanity', 'threaten the peace, security and well-being of the world' and deserve to be prosecuted by 'every State' (Preamble to the Rome Statute of the ICC). The ICC, in other words, operates on the assumption that the world is bound together by certain core values, or as the preamble to the ICC Statute describes it, the assumption that 'all peoples are united by common bonds, their cultures pieced together in a shared heritage'. From this imagery of international relations follows an obligation for all states to prosecute crimes that threaten the 'delicate mosaic' that holds the world together, and to accept the power of the ICC to step in if states are unwilling or unable to do so. The language of a global community united against 'enemies of mankind' was mobilized, *inter alia*, by the government of Uganda after it referred the situation in Northern Uganda to the ICC. Its long-standing fight against the Lord's Resistance Army could now be articulated as a fight against enemies of the world as a whole, backed up by a cosmopolitan institution (Nouwen and Werner 2010).

However, despite its cosmopolitan outlook the ICC is also an organization that rests on the will and cooperation of sovereign states. Earlier international criminal tribunals were often created top-down, by victorious powers (e.g. Nuremberg, Tokyo) or by the Security Council (e.g. Yugoslavia, Rwanda). The ICC is created bottom-up, through a treaty that rests on the freely expressed consent of sovereign states. This of course seriously hampers the cosmopolitan ambitions of the ICC, as is evidenced by the absence – and lack of cooperation – of powerful states such as the United States, China or Russia. The ICC not only rests on a treaty created by and through the consent of states, it also heavily depends on states when it comes to the effectuation of its arrest warrants. Since the ICC lacks its own police force, it can only serve its cosmopolitan agenda if states are willing and able to cooperate with the ICC.

The ICC is thus a cosmopolitan and a state-centric organization at the same time. Both aspects are symbolized by article 13 of the ICC Statute, which regulates the conditions under which the Court may exercise its jurisdiction. According to article 13, the Court may exercise jurisdiction if a state party refers a case to the ICC, thus laying the initiative in the hands of governments of sovereign states. Another option offered by article 13 is that the Prosecutor initiates proceedings, thus empowering one of the organs of the Court itself. However, there is a third way in which proceedings can kick off, and that is if the Security Council refers a situation to the Court. In effect, this means that the (permanent) members of the Security Council enjoy special powers to determine which situations the Court can take up. The position of the members of the Council is further strengthened by article 16 of the Statute. According to this article, the Security Council can block investigations or prosecutions by the ICC for a period of 12 months, and offers the Council the opportunity to renew the request under the same conditions. This brings a third image of the Court: the Court as an institution rooted in legalized inequality between the permanent members of the Security Council and the rest of the world.

The ICC thus offers an interesting illustration of three different vocabularies on the nature of the legal community it regulates: a cosmopolitan narrative, a narrative of sovereign equality and a narrative of formal inequality. All three have been mobilized lately by several African states and the African Union in their critiques of the ICC. Put simply, the critique is that the ICC has focused almost exclusively on African situations, as if the most heinous criminals all reside on this continent. The cosmopolitan symbolism of the ICC is thus recognized, but turned against the ICC itself: precisely because the ICC claims to deal with crimes that shock the conscience of humanity, it should be careful not to locate these crimes exclusively on one particular continent. Of course, such critiques are more poignant in the case of Africa, as it bears a long history of international law treating it as barbaric and radically different from the 'civilized West'. The cosmopolitan pretensions of the ICC are thus held against the practice of the ICC, and the argument is made that in this case the Court fits in a longer trend of Western powers using universal values to subdue Africa.

At the same time, the state-based nature of the ICC is recognized, and turned against the Court itself. This type of critique was voiced in relation to the arrest warrant issued against the incumbent president of Sudan, al-Bashir. The arrest warrant followed upon a referral by the Security Council, who referred the situation in Darfur since July 2002 to the ICC via Resolution 1593 (2005). The Office of the Prosecution thereupon decided to go after the president of

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Sudan and issued two arrest warrants against him. Since the African Union held that the arrest warrant would hamper the fragile peace process in Sudan, it repeatedly asked the Security Council to use its formal powers under article 16 to suspend the arrest warrant. However, the Security Council refused to act upon the requests of the African Union, leaving the latter frustrated and increasingly critical about the functioning of the Council and the ICC. A similar pattern emerged after the ICC issued arrest warrants (this time without prior Security Council referral) against Kenya's president Uhuru Kenyatta and his deputy William Ruto, who were accused of crimes against humanity. The position of the Security Council spurred critiques of neo-imperialism: an exclusive club assumes the power to start investigations into an African president, and subsequently ignores African pleas to take into consideration possible effects on peace and security. Another complicating factor was that Sudan was not a party to the ICC, as were several other African states. What would the situation be if al-Bashir would travel to another non-party state? Would that state be bound by the age-old international rules on state immunity, and thus under an obligation to protect al-Bashir from investigation and arrest? In other words: was the relation between Sudan and other countries one of formal equality, crystalized in the regime of state immunity? Or would that state be bound by the arrest warrant, as this ultimately rooted in the powers of the Security Council, which can create formal inequality between states? Whereas the ICC took the latter position, the African Union held on to the immunity of heads of state. This position was later reconfirmed in relation to the arrest warrants against the Kenyan president and his deputy, and even applied to the newly established African Court of Justice and Human Rights, that is supposed to respect the immunity of African Heads of State and senior officials (Kersten 2014). The struggle between the ICC and the African Union was deepened further when the African Union started to call for (collective) withdrawal from the Statute of the ICC. This call was followed by a number of actual resignations, including the highly symbolic retreat from South Africa.

However, one should be careful to speak of 'the' African critique, as if the whole continent speaks with a single voice. Not all African states share the critique and some states openly criticized (calls for) withdrawal from the Statute. Botswana, for example, argued 'that such a move betrays the rights of the victims of atrocious crimes to justice and also undermines the progress made to date in the global efforts to fight impunity' (Botswana Government Statement, 2016). Within South Africa, high profile figures such as Bishop Tutu characterized calls for withdrawal as 'African leaders (...) effectively seeking a license to kill, maim and oppress their people without consequences' (Tutu 2013). Last but not least, South Africa's constitutional Court decided that withdrawal was invalid and unconstitutional, thus opening up a renewed debate on South Africa's position vis-à-vis the ICC (Democratic Alliance v Minister of International Relations and Cooperation and Others 2017). The 'clash of civilizations' as presented by the African Union is thus not acknowledged by everyone on the African continent. Alongside the narrative of a struggle between a (Western) ICC and a marginalized continent are narratives about Africa's continued commitment to cosmopolitan ideals – even though the actual functioning of the ICC may still be subject to substantive critique.

Conclusion

So far, international law remains an under-researched topic in the literature on Huntington's 'clash of civilizations'. This is remarkable since international law itself was born out of such a clash. For centuries, the relation between Western, self-declared 'civilized' states and other, so-called less civilized parts of the world was one of the core questions in international law. International law was used as a vocabulary to define different levels of civilization and to regulate the relations between these stipulated civilizations. While the language of 'civilization' has now become formally outmoded in international law, many have claimed that regimes such as human rights, trade or security are still based on standards of civilization. Such claims, however, should not be treated as truth claims. More often than not, they are made as part of a normative debate on the nature of international society, and generally they are used to critique existing legal regimes. In this way, such claims actually aim to underscore competing conceptions of international society, based, for example, on notions of formal equality of nations or cosmopolitan equality between cultures and individuals. In this article I have illustrated the mobilization of such competing notions of international society in the African Union's critique of the ICC as a neo-colonial institution. This discussion was also meant to underscore another point: descriptions of the nature of (international) society, such as Huntington's 'clash of civilizations', are also speech acts, yielding presentations of institutional (legal) facts (Ruiter, 1993). In other words: they create imageries of society, which are intrinsically linked to the normative ties that are supposed to exist between its members. International legal argumentation is filled with debates where competing conceptions of

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society form the basis for normative claims about the relevant agents and their legal relations. The imagery of clashing civilizations is one of them, and one that still holds appeal, as the saga of the African Union's critique of the ICC attests.

Notes

[1] See for example Miller and Bratspies (2008, 9 and 10), where the editors move from a brief mention of Huntington's thesis straight to a discussion of the functional fragmentation of international law.

[2] See for example Huntington's description of what counts as a sound model at (Huntington 1997, 30).

[3] For an elaborate analysis of the impact of different conceptions of society and the rule of law see Dworkin (1985).

[4] For an analysis see Werner (2016). The part on the *Lotus* case is taken from this article.

[5] The text can be found, *inter alia*, at 'Constitution Society'. Available at: http://www.constitution.org/victoria/victoria_5.htm Accessed 21 September 2017.

[6] For an analysis see Anghie (2004). For an emphasis on Vitoria's cosmopolitan thinking, see Scott (1934).

[7] For an excellent analysis of the position of nineteenth century international lawyers in relation to colonialism see Koskenniemi (2002), in particular chapter two.

[8] The quote is taken from Koskenniemi (2002, 115).

[9] As Koskenniemi (2002, 135) has put it: 'The existence of a "standard" was a myth in the sense that there was never anything to gain. Every concession was a matter of negotiation, every status depended on agreement, *quid pro quo*. But the existence of a *language of a standard* still gave the appearance of a fair treatment (...)' . The classical study on the standard of civilization remains Gong (1984).

[10] Although Huntington does not explicitly link his invocation of the imperialist heritage to international law, his line of argumentation is similar to that of several critical legal scholars: 'The West is attempting and will continue to attempt to sustain its preeminent position and defend its interests by defining those interests as the interests of the "world community"' (1997, 184).

[11] The classical work in this respect remains Anghie (2004). See also Douzinas (2007).

[12] *Infra* note 15.

[13] The landmark Resolutions driving this process were General Assembly Resolutions 1514 (1960) and 2625 (1970). For an analysis of decolonization and specific aspects of international law see Craven (2009).

[14] For an analysis of the significance of this changing conception of sovereignty see Schmitt (2003).

[15] See in particular article four of the Constitutive Act of the African Union. After reaffirming the principles of sovereign equality and non-intervention, the Act empowers the Union to interfere when war crimes, genocide and crimes against humanity are committed, and emphasizes respect for democratic principles, human rights, the rule of law and good governance.

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