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Scope, Scale and Humility in the History of International Law

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> General legal history is, for good reasons, concerned with all legal developments of the past regardless both of where they appeared, and also of whether or not they prevailed over the longer term. The history of international law has no reason for proceeding otherwise.[1]

Scope

For over a century, from the second half of the nineteenth to almost the end of the twentieth century, a single master narrative overshadowed the historiography of international law. It located the roots of international law in the rise of the sovereign state in early modern Europe and exalted its unfolding and global expansion as contributions towards the progression of peace, justice and civilisation. This narrative placed the writing of history radically at the service of modern international law. Its emergence was contemporary with the consolidation of modern international law as an autonomous academic discipline and it was, in terms of disciplinary turfs, the work of legal scholars rather than of historians.

Recently, the Belgians François Laurent (1810–87) and his student Ernest Nys (1851–1920) have been singled out as the pioneers of international law's modern historiography.[2] Laurent, Belgium's leading civil lawyer of the

[1] Wolfgang Preiser, 'History of international law, basic questions and principles' in Rüdiger Wolfrum and Anne Peters (eds.) *Max Planck Encyclopedia of Public International Law*, vol. 4 (3rd edn, Oxford: Oxford University Press 2012) 896–902, at 898–9.

[2] Martti Koskenniemi, 'A history of international law histories' in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press 2012) 943–71, at 943–4; Martti Koskenniemi, 'Histories of international law: significance and problems for a critical view', *Temple International and Comparative Law Journal*, 27 (2013) 215–40, at 220–1.

nineteenth century, penned an eighteen-volume history of international relations and law under the double titles of *Histoire du droit des gens et des relations internationales* and the grander *Études sur l'histoire de l'humanité*.[3] While it was rather a study of international relations and society than of international law and was imprinted with Laurent's idiosyncratic readings of cultural history and philosophy, the massive work pushed the agenda of humanity's progress. In order to attain its final goal of unity and solidarity, humanity had to go through the transitional phase of its divisions into nations and states, the setting for its slow and gradual maturation from classical Antiquity onwards. After finishing the series, Laurent went on to pen the thirty-three volumes of his survey of Belgian civil law and an eight-volume series on private international law.[4] His *Principes de droit civil* remained the most authoritative statement of Belgian private law until the middle of the twentieth century. Although it was presented as a commentary on the Belgian civil code in the style of the French-Belgian exegetic school, it was an attempt at pouring doctrinal law into a systemic mould based on general principles and clear conceptions and drew on historical insights in the doctrinal development of the learned law since Roman times. More than Laurent's personal readings of international law's history, Laurent's *opus magnum* on civil law influenced the methodological outlook of Ernest Nys, and through him that of mainstream historiography of international law.[5]

After his studies in law and philosophy at Ghent, Nys continued his education at Heidelberg, Leipzig and Berlin, where he came into contact with the German traditions of historical jurisprudence and Pandect science, but also with the legal historical work of, among others, Theodor Mommsen (1817–1903). Nys became professor at the Faculty of Law of the Université libre de Bruxelles in 1885, where he took on the course on the law of nations upon the death of the Swiss Roman and international lawyer Alphonse Rivier (1835–98).[6] Among the

[3] The four first volumes appeared under the title *Histoire du droit des gens et des relations internationales* (Ghent: L. Hebbelynck and J.-B Merry 1850); from Volume 5 onwards *Études sur l'histoire de l'humanité* became the lead title but the older one still appeared as well (2nd edn, Ghent: Méline, Cans et Compagnie 1855–70).

[4] François Laurent, *Principes de droit civil* (33 vols., Brussels: Bruylant 1869–78); François Laurent, *Le droit civil international* (8 vols., Brussels: Bruylant, 1880–2).

[5] Dirk Heirbaut, 'Weg met De Page? Leve Laurent? Een pleidooi voor een andere kijk op de recente geschiedenis van het Belgische privaatrecht', *Tijdschrift voor Privaatrecht*, 54 (2017) 267–322; Dirk Heirbaut, 'Principes de droit civil (Principles of Private Law) 1869–1878 François Laurent (1810–1887)' in Serge Dauchy, Georges Martyn, Heikki Pihlajamäki and Alain Wijffels (eds.), *The Formation and Transmission of Western Legal Culture. 150 Books That Made the Law in the Age of Printing* (Cham: Springer 2016) 388–91.

[6] Henri Rolin, 'Notice sur Ernest Nys: Biographie', *Revue de l'université de Bruxelles*, 4 (1951–2) 349–57.

leading international lawyers from around the turn of the twentieth century, Nys was the one who applied himself most to the history of the field. His major text on the subject, *Les origines du droit international* (1894), offers a survey of the doctrinal development of international law through scholarly writings, starting with those of the late medieval civilians, canonists and theologians. With this, he attempted to embed the intellectual history of international law into the standard narrative of the history of the civil law tradition, which takes off with the rediscovery of the Digest in the eleventh century and the emergence of classical canon law in the twelfth century. His textbook on international law also provided the reader with a brief analysis of the historical development of the most important doctrines and institutions in European scholarship. His *oeuvre*, including his numerous historical contributions to the *Revue de droit international et de législation comparée*, forms a gold mine of information on the doctrinal history of the law of nations and many of its more and less well-known intellectual protagonists.[7]

The profound historical work of Nys was not widely followed, nor did the history of international law blossom into a significant sub-branch of legal history until the very end of the twentieth century. Laurent and Nys are most relevant to the emergence and development of the master narrative of the historiography of modern international law for being representative of its major ideological, liberal–progressive thrust, and its methodological focus on doctrine. Rather than through dedicated historical work, the master narrative was further forged and presented through historical writings by international lawyers who were ancillary to their expositions of international law, most clearly so in historical introductions to textbooks on international law.[8] This master narrative was only slowly and patchily fleshed out in general surveys of the history of international law or thematic studies. These too, by and large, were the work of international lawyers.[9] The narrative proved very

[7] Ernst Nys, *Les origines du droit international* (Brussels and Paris: Alfred Castaigne and Thorin et fils 1894); Ernst Nys, *Le droit international. Les principes, les théories, les faits* (1904–6, 2nd edn, Brussels: Weissenbruch 1912); Frederik Dhondt, 'L'histoire, parole vivante du droit? François Laurent en Ernest Nys als historiografen van het volkenrecht' in Bruno Debaenst (ed.), *De Belle Époque van het Belgisch Recht* (Bruges: Die Keure 2016) 91–115; Martti Koskenniemi, 'Histories of international law: dealing with Eurocentrism', *Rechtsgeschichte*, 19 (2011) 152–76, at 152–4.

[8] For a classic example, Lassa Oppenheim, *International Law. A Treatise*, 2 vols. (2nd edn, London: Longmans, Green and Co. 1912) vol. 1, 45–104.

[9] Early examples include Thomas Alfred Walker, *A History of the Law of Nations* (Cambridge: Cambridge University Press 1899); Cornelis van Vollenhoven, *The Three Stages of the Law of Nations* (The Hague: Martinus Nijhoff 1919); Cornelis van Vollenhoven, *Du droit de paix. De iure pacis* (The Hague: Martinus Nijhoff 1932). See

persistent and often impervious to challenges raised by in-depth historical studies.[10] Although it has been subject to radical and mounting revisionist criticism since the 1990s, it has not yet been replaced by another. Until the 2010s, general surveys, even if they took much of this criticism on board, retained as their backbone the old narrative core of the birth and emergence of international law in the European early modern age and nineteenth-century global expansion.[11]

In the traditional master narrative of the history of international law, three strands from mid- and late nineteenth-century legal and historical scholarship were woven together. First, its framers conceptually reduced the understanding of international law to that of modern public international law, which exclusively applies to relations between sovereign, equal states. They insisted on the separation and autonomy of public international law from private law, including transnational and private international law.[12] They largely adhered to the basic tenet of international legal positivism that denied the obligatory character of natural law and restricted international law to the rules to which states had consented through treaties and customary law. In consequence, they shrank the scope of international law's history to the direct antecedents of modern public international law and celebrated its emancipation from natural law and general jurisprudence, which applied to both states and

Ignacio de la Rasilla, *International Law and History. Modern Interfaces* (Cambridge: Cambridge University Press 2021) 20–30; Raymond Kubben, 'Completing an unfinished jigsaw puzzle: Cornelis van Vollenhoven and the study of international law' in Luigi Nuzzo and Milos Vec (eds.), *Constructing International Law. The Birth of a Discipline* (Frankfurt am Main: Vittorio Klostermann 2012) 483–522.

[10] Peter Haggenmacher's brilliant study on the continuous development of jurisprudence from the Late Middle Ages to Grotius, while widely applauded, did not slay the myth of the Renaissance origins of legal scholarship with regard to the law of nations. His major point became a point of contestation in Grotius studies but was, until very recently, largely ignored in grand narratives of the history of international law. Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris: Presses universitaires de France 1983).

[11] E.g. Dominique Gaurier, *Histoire du droit international. De l'antiquité à la création de l'ONU* (Rennes: Presses universitaires de Rennes 2014); Stephen C. Neff, *Justice among Nations. A History of International Law* (Cambridge, MA and London: Harvard University Press 2014); Ian Shaw, *International Law* (8th edn, Cambridge: Cambridge University Press 2017) 10–31. Only in very recent years has late medieval legal scholarship begun to gain more than a marginal place in long-range surveys of the intellectual history of the European law of nations. Dante Fedele, *Naissance de la diplomatie moderne (XIIIe–XVIIe siècles). L'ambassadeur au croisement du droit, de l'éthique et de la politique* (Baden: Nomos Verlag 2017); Martti Koskenniemi, *To the Uttermost Parts of the Earth. Legal Imagination and International Power 1300–1870* (Cambridge: Cambridge University Press 2021).

[12] Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (London: Longmans, Green and Co. 1927) 1–87.

individuals alike. For this, they continued to credit Hugo Grotius (1583–1645) and his seminal *De jure belli ac pacis* (1625), as some writers on the law of nations from the eighteenth century had done before.[13]

Second, unlike earlier historians of international law such as Friedrich Carl van Moser (1723–98), Robert Ward (1765–1846) and Henry Wheaton (1785–1848), they rewrote the story of the European emergence and progression of the law of nations from the perspective of universal history.[14] These earlier writers of the law of nations had been Eurocentric in their focus on the historical development of the public law of Europe, but they claimed to be writing the particular history of a regional legal tradition. Modern international lawyers, from the times of Laurent onwards, considered the rise of the sovereign state and the development of the law of nations as blazing the trail of the whole of humanity towards ever greater levels of peace, justice and civilisation. More than the development of a particular system of political and legal order, the historical development of the modern state system and of its international law in Europe and the West was understood in terms of the gradual unfolding and exploration of universal, timeless truths and values.[15] With this, the historiography of international law followed in the footsteps of the writers of general universal histories from the late eighteenth and the nineteenth centuries who had placed Europe at the head of humanity's progress and saw the European-style state as its vector.[16]

[13] Oppenheim, *International Law*, vol. 1, 87–8; Samuel Rachel, *De jure naturae et gentium dissertationes* (1676, The Classics of International Law, 2 vols., Washington: Carnegie Institution of Washington 1916) vol. 2, 1–4.

[14] Friedrich Carl von Moser, *Beyträge zu dem Staats- und Völcker-Recht und der Geschichte* (4 vols., Frankfurt: J.C. Gebhard 1764–72); Robert Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe from the Time of the Greeks and Romans, to the Age of Grotius* (2 vols., Dublin: P. Wogan, P. Byrne, W. Jones and J. Rice 1795); Henry Wheaton, *History of the Law of Nations in Europe and America from the Earliest Times to the Treaty of Washington, 1842* (New York: Gould, Banks & Co. 1845).

[15] Tilmann Altwicker and Oliver Diggelmann, 'How is progress constructed in international legal scholarship?', *European Journal of International Law*, 25 (2014) 425–44; Gustavo Gozzi, 'History of international law and Western civilization', *International Community Law Review*, 9 (2007) 353–73; Jennifer Pitts, *Boundaries of the International. Law and Empire* (Cambridge, MA and London: Harvard University Press 2018) 124–84.

[16] Patrick Conrad, *What Is Global History?* (Princeton: Princeton University Press 2016) 18–25; Marnie Hughes-Warrington, 'Writing world history' in David Christian (ed.), *The Cambridge World History*, vol. 1 (Cambridge: Cambridge University Press 2015) 41–55, at 46–8; Dominic Sachsenmaier, 'The evolution of world histories' in Christian, *The Cambridge World History*, vol. 1, 56–83, at 64–6; Michael Lang, 'Evolution, rupture, and periodization' in Christian, *The Cambridge World History*, vol. 1, 84–109, at 84–91; Jürgen Osterhammel, 'World history' in Alex Schneider and Daniel Woolf (eds.), *The Oxford History of Historical Writing*, vol. 5 (Oxford: Oxford University Press 2011) 93–112, at 93–6.

Third, the historiography of international law was deeply influenced by the tenets of positivist methodology that permeated the burgeoning discipline of modern international law. The theory and methodology of international law were in turn tributary to the legal theory of Friedrich Carl von Savigny (1779–1861), the Berlin professor of Roman law who was the father of the historical school and the forerunner of Pandect science.[17] Savigny's theory of law and historical jurisprudence not only dominated German legal scholarship, as well as legal history, during the nineteenth century, but also held wide international resonance throughout both civil- and common-law jurisdictions. This was in particular the case in the United States.[18] The development of international law into an academic discipline was methodologically driven by the scientific paradigm of construing the field of knowledge into a stable, coherent, internally consistent and complete system on the basis of general principles and clearly defined conceptions. It was Savigny's followers from the German Pandect science who were most insistent and successful in the translation of the general paradigm of scientific system building into a disciplinary programme for law. It was this programme which was copied by international lawyers. These international legal scholars declared themselves, in the absence of a legislative authority, responsible for bringing order to the mass of scholarly writings, treaties and customs, discerning what constituted the conceptions, rules, institutions and principles of international law and forging it into a system. Like the German students of private law and followers of Savigny, they saw this as a necessary step towards codification. This scientific paradigm drove international lawyers towards writing systematic textbooks, and towards an instrumental study of international law's past development. The past was the empirical treasure trove to search for the conceptions and principles that would form the building blocks of the system.[19] Moreover, the scientific concern with conceptions and principles explains the focus on doctrinal developments and scholarly writings to the detriment of practice in the historiography of international law – a focus which has persisted until very recently.

[17] Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press 1999) 116–23; James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era. Historical Vision and Legal Change* (Princeton: Princeton University Press 1990).

[18] Robert W. Gordon, 'The common law tradition in American legal historiography' in Robert W. Gordon, *Taming the Past. Essays on Law in History and History in Law* (Cambridge: Cambridge University Press 2017) 17–49.

[19] Lassa Oppenheim, 'The science of international law: its task and method', *American Journal of International Law*, 2 (1908) 313–56.

The conceptual reduction of international law to modern public international law was accompanied by the parallel reduction of the purview of its historiography to the direct antecedents of this modern version of international law. For all its universalist claims and eschatological end-of-history implications, the master narrative was in fact the particular narration of a single form of 'international law' from human history. The state-centric and Eurocentric understanding of international law dictated the scope of its historical narrative, which was hence heavily shrunk in terms of chronology and geography.[20] In terms of chronology, most nineteenth-century international lawyers situated the origins of the sovereign state, and thus of their field of study, in the seventeenth century. For the origins of international law they commonly indicated the publication of Grotius' treatise on the laws of war and peace in 1625 and the Peace Treaties of Westphalia of 1648. These two events allegedly marked the emancipation of the law of nations – the antecedent of modern public international law – as the preserve of states from the law at large, and from the logic of private law in particular. Writers who pre-dated Grotius, such as the late medieval civilians, canonists and theologians and the Spanish neo-scholastics, were relegated to the role of precursors of Grotius.[21] The American international lawyer James Brown Scott (1866–1943) designed The Classics of International Law, an edition of historical texts ranging from the fourteenth century to the nineteenth, around a triple division of precursors, Grotius and followers.[22] His later endeavours to replace Grotius as 'founder' of international law with the Spanish theologian Francisco de Vitoria (*c.* 1483–1546), for which he successfully enlisted the aid of the Spanish international lawyer Camilo Barcia Trelles (1888–1977), assured the expansion of the chronological range of the intellectual history of international law into the sixteenth century and the inclusion of the Spanish neo-scholastics, as well as humanist writers, but also deepened the divide from the late Middle Ages.[23] Notwithstanding the

[20] Ignacio de la Rasilla speaks of a double exclusionary bias. See his 'The shifting origins of international law', *Leiden Journal of International Law*, 28 (2015) 419–40.

[21] Ernest Nys, *Le droit de la guerre et les précurseurs de Grotius* (Brussels: Murquardt 1882); Karl von Kaltenborn, *Die Vorläufer des Hugo Grotius auf dem Gebiete des ius naturae et gentium sowie der Politik im Reformationszeitalter* (Leipzig: G. Maier 1848).

[22] Paolo Amorosa, *Rewriting the History of the Law of Nations. How James Brown Scott Made Francisco de Vitoria the Founder of International Law* (Oxford: Oxford University Press 2019) 127–32.

[23] *Ibid.*, 136–85; Ignacio de la Rasilla, *In the Shadow of Vitoria. A History of International Law in Spain (1770–1953)* (Leiden and Boston: Brill/Nijhoff 2018) 149–56, 171–73, 196–223; Ignacio de la Rasilla, 'Camilo Barcia Trelles in and beyond Vitoria's shadow (1888–1977)', *European Journal of International Law*, 31 (2020) 1433–49; Randall

more balanced treatment of late medieval and early modern writers in the mature works of Nys, the writings of late medieval civilians and canonists, which were actually of great influence on the diplomatic and legal practice of their day, as well as crucial sources for the writers of the sixteenth and early seventeenth centuries, including Grotius,[24] have been almost completely ostracised from the master narrative of international law's history.[25] From around the middle of the twentieth century, some German scholars argued for the emergence of the European state system around 1300, but this had little resonance in international academic circles.[26] In terms of geography, the historical emergence and development of the law of nations, the direct antecedent of modern international law, was situated in Christian Europe. From there it was considered to have gradually spread over the world, starting in the late eighteenth century with the independence of the United States of America (1776–83). This global expansion occurred either through the double process of formal colonisation and decolonisation or through reception of international law in the context of informal imperialism.

After the First World War, a few individual legal historians and international lawyers made attempts at expanding the chronological and geographical scope of international law's history by including pre-early modern and non-European legal developments. They were, however, hardly able to dent the state-centrism and Eurocentrism of the master narrative. Drawing on the work of, among others, Henry Sumner Maine (1822–88), the Russian British legal historian Paul Vinogradoff (1854–1925) introduced a typology of different systems of international law, which had appeared throughout human history, and pleaded for their comparative investigation.[27] The idea

Lesaffer, 'The cradle of international law: Camilo Barcia Trelles on Francisco de Vitoria at The Hague (1927)', *European Journal of International Law*, 31 (2020) 1451–62.

[24] Haggenmacher, *Grotius et la doctrine de la guerre juste*.

[25] Randall Lesaffer, 'Roman law and the intellectual history of international law' in Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press 2016) 38–58; James Muldoon, 'The contribution of the medieval canon lawyers to the formation of international law', *Traditio*, 28 (1972) 483–97.

[26] Starting with Wilhelm G. Grewe, *The Epochs of International Law* (Berlin etc.: Walter de Gruyter 2000), whose grand survey actually dates back to his habilitation in 1941. The first print, *Epochen der Völkerrechtsgeschichte* (Leipzig: Köhler & Amelang 1943–5) was never published because of the war. Its first actual publication had to await until 1984 (Baden: Nomos Verlag 1984). Ruth Lambertz-Pollan, *Auf dem Weg zu Souveränität und Westintegration (1948–1955). Der Beitrag des Völkerrechtlers und Diplomaten Wilhelm Grewe* (Baden: Nomos Verlag 2016) 23.

[27] Paul Vinogradoff, *Historical Types of International Law. Lectures Delivered in the University of Leiden* (Leiden: E.J. Brill 1923); William E. Butler and Vladimir A. Tomsinov, 'Sir Paul Vinogradoff: a biographical sketch' in William E. Butler (ed.), *On the History of*

of a comparative study of different systems or types of international law was picked up variously later in the twentieth century by a few international lawyers such as Georg Schwarzenberger (1908–91) but rarely pursued seriously.[28]

Among Western comparatist historians of international law from the decades after the Second World War, the German Roman lawyer Wolfgang Preiser (1903–97) may be ranked first. Preiser pleaded for the expansion of the historiography of international law to pre-early modern times as well as to the non-European world. His own research focused on the history of international law in the Middle East and the Mediterranean during Antiquity. While he acknowledged that most doctrines and institutions of the early modern law of nations were not the product of a continuous development from pre-classical and classical Antiquity onwards, he pointed nevertheless to the remarkable resilience of certain general underlying ideas and conceptions, such as natural law, just war or interstate friendship. He considered this sufficient to speak of a tradition two and a half millennia long of 'European law of nations'.[29] Preiser, however, did not want to restrict the scope of international law historiography to the European tradition. He advocated including any occurrence of international law from the human past within its ambit and pleaded for the comparative study of all systems and traditions of international law from various regions and periods. For this, he proposed a more general and inclusive understanding of international law. According to him, one could speak of an international order with international law if three conditions were fulfilled: (1) the co-existence of different independent 'states' that mutually recognised one another as members of that order, (2) the existence of sufficiently intense relations to necessitate their legal regulation and (3) the recognition that these regulations were binding and created rights and obligations.[30] Preiser set himself on the path

International Law and International Organization. Collected Papers of Sir Paul Vinogradoff (Clark, NJ: The Lawbook Exchange 2009) 15–34.

[28] Georg Schwarzenberger, *The Dynamics of International Law* (Abingdon: Professional Books 1976) 32–55; A.M. Connelly, 'The history of international law: a comparative approach', *Year Book of World Affairs*, 32 (1978) 303–19.

[29] Wolfgang Preiser, 'Über die Ursprünge des modernen Völkerrechts' in *Internationalrechtliche und staatsrechtliche Abhandlungen. Festschrift für Walter Schätzel zum 70. Geburtstag* (Düsseldorf: Verlag Gebr. Hermes 1960) 373–87.

[30] Wolfgang Preiser, *Die Völkerrechtsgeschichte. Ihre Aufgaben und Methoden* (Wiesbaden: Franz Steiner Verlag 1964); Preiser, 'Basic questions and principles', 897–9; Heinhard Steiger, 'Universality and continuity in international public law?' in Thilo Marauhn and Heinhard Steiger (eds.), *Universality and Continuity in International Law* (The Hague: Eleven International Publishing 2011) 13–43, at 22–4.

of global comparison by authoring a study on international law in pre-Columbian America, Oceania, sub-Saharan Africa, the Indian subcontinent and Eastern Asia.[31]

The pull of the kind of comparatist world history of international law that Preiser proposed remained marginal. Studies on ancient and medieval European law were few and far between until the twenty-first century.[32] Preiser's own effort at studying non-European regional systems of international law only found a follow-up in a series of historical surveys in the first and subsequent editions of the *Encyclopedia of Public International Law*.[33]

The bigger push towards widening the scope of the historiography of international law beyond Europe did not come from Western comparatist historians, but emerged out of the decolonisation wave after the Second World War. From the 1950s onwards, lawyers from what later became known as the TWAIL (Third World Approaches to International Law) movement challenged the Eurocentrism of traditional historiography of international law by claiming that other regions had their own international law prior to the imperial encounter with Europe and the introduction of Western international law.[34] The first generation of post-colonial international lawyers from the Third World endeavoured to harness international law to the cause of their newly independent countries and strove to amend it in the service of more equal and fair international political and economic relations. However, they did not fundamentally challenge the underlying

[31] Wolfgang Preiser, *Frühe völkerrechtliche Grundlagen der außereuropäischen Welt. Ein Beitrag zur Geschichte des Völkerrechts* (Wiesbaden: Franz Steiner Verlag 1976).

[32] Bruno Paradisi, *Storia del diritto internazionale nel medio evo* (2 vols., Milan and Naples: Giuffrè and Jovene 1940–50); Bruno Paradisi, *Civitas maxima. Studi di storia del diritto internazionale* (2 vols., Florence: Leo S. Olschki 1974); Giulio Vismara, *Scritti di storia giuridica*, vol. 7, *Communità e diritto internazionale* (Milan: Giuffrè 1989); Karl-Heinz Ziegler, *Die Beziehungen zwischen Rom und dem Partherreich. Ein Beitrag zur Geschichte des Völkerrechts* (Wiesbaden: Franz Steiner Verlag 1964); Karl-Heinz Ziegler, *Fata iuris gentium. Kleine Schriften zur Geschichte des europäischen Völkerrechts* (Baden: Nomos Verlag 2008).

[33] In the most recent edition, Rüdiger Wolfrum and Anne Peters (eds.) *Max Planck Encyclopedia of International Law* (Oxford: Oxford University Press 2012): Thomas A. Mensah, 'International law, regional developments: Africa'; Mohammad Fadel, 'International law, regional developments: Islam'; Vicente Moratta Rangel, 'International law, regional developments: Latin America'; Shotaro Hamamoto, 'International law, regional developments: East Asia'; Diane A. Desierto, 'International law, regional developments: South and South-East Asia'.

[34] James Thuo Gathii, 'TWAIL: a brief history of its origins, its decentralized network and a tentative bibliography', *Trade and Development*, 3 (2011) 26–64; De la Rasilla, *International Law and History*, 117–51.

assumption of international law's progressive force. The historical dimension of their work pointed at the inclusion of their different regions in the universal history of international law. Scholars such as Ram Prakash Anand (1933–2011) and Nagendra Singh (1914–88) from India or Taslim Olawale Elias (1914–1991) from Nigeria and others did so by studying international relations and law in their part of the world from before the period of European imperialism and colonisation.[35] More than just indicating that 'we had international law too', to use the phrase of the Japanese international lawyer Yasuaki Onuma (1946–2018),[36] TWAIL scholars argued for the contribution of their region to the modern global order and its international law, both in more remote and in recent times.[37] For this, they found support in the works and historical theory of the Polish-British scholar Charles Henry Alexandrowicz (1902–75), who spent part of his career in post-independence India. Alexandrowicz, who studied the commercial, diplomatic and treaty relations of Asian and African powers with European interlopers since the

[35] Ram Prakash Anand, *Origin and Development of the Law of the Sea. History of International Law Revisited* (Leiden: Martinus Nijhoff 1983); Ram Prakash Anand, 'The influence of history on the literature of international law' in R. St J. Macdonald and Douglas M. Johnston (eds.), *The Structure and Process of International Law. Essays in Legal Philosophy, Doctrine and Theory* (The Hague, Boston and Lancaster: Martinus Nijhoff 1983) 175–214; Ram Prakash Anand, *Studies in International Law and History. An Asian Perspective* (Leiden: Martinus Nijhoff 2004); Ram Prakash Anand, *Development of Modern International Law and India* (Baden: Nomos Verlag 2005); Taslim O. Elias, *Africa and the Development of International Law* (2nd edn, Dordrecht: Martinus Nijhoff 1988); Nagendra Singh, *Indian and International Law* (Dehli: Chand 1973); Carl Landauer, 'Things fall together: the past and future Africas of T.O. Elias's *Africa and the Development of International Law*', *Leiden Journal of International Law*, 21 (2008) 351–75; Carl Landauer, 'Passage from India: Nagendra Singh's India and international law', *India Journal of International Law*, 56 (2016) 265–305; Carl Landauer, 'Taslim Olawale Elias: from British colonial to modern international law' in Jochen von Bernstorff and Philipp Dann (eds.), *The Battle for International Law. South–North Perspectives on the Decolonization Era* (Oxford: Oxford University Press 2019) 318–40; Prabhakar Singh, 'Reading RP Anand in the post-colony. Between resistance and appropriation' in *ibid*., 297–317.

[36] Yasuaki Onuma, 'When was the law of international society born?', *Journal of the History of International Law*, 2 (2000) 1–66, at 61.

[37] Antony Anghie and B.S. Chimni, 'Third World approaches to international law and individual responsibility in internal conflicts', *Chinese Journal of International Law*, 2 (2003) 77–103, at 78–82; Arnulf Becker Lorca, 'Eurocentrism in the history of international law' in Fassbender and Peters, *The Oxford Handbook of the History of International Law*, 1034–57, at 1039–50; B.S. Chimni, 'The past, present and future of international law: a critical Third World approach', *Melbourne Journal of International Law*, 8 (2007) 499–515, at 499–505; Doreen Lustig, 'Governance histories of international law' in Markus D. Dubber and Christopher Tomlins (eds.), *The Oxford Handbook of Legal History* (Oxford: Oxford University Press 2018) 859–82, at 863–8; Sundhya Pahuja, *Decolonising International Law. Development, Economic Growth and the Politics of Universality* (Cambridge: Cambridge University Press 2011).

sixteenth century, argued that before the nineteenth century these relations were based on equality. In many cases, Europeans submitted to local laws, practices and institutions in their dealings with African and Asian rulers and peoples. According to him, transregional diplomatic and legal practices were partly conducted under a common, universal understanding of some basic values and principles which the Europeans acknowledged as part of natural law. It was only with the rise of international legal positivism at the end of the nineteenth century that this balance was broken and the West claimed universal validity for its own regional system.[38] More recently, scholars such as Onuma have rejected Alexandrowicz's theory of the existence of a transregional or trans-civilisational universal order that pre-dated the period of decolonisation. Much as Preiser had done, they adhered to the theory of separate, regional international legal orders and systems, of which the European was just one.[39]

The second generation of TWAIL scholars from the 1980s and 1990s onwards mounted a much more fundamental challenge to the universalist claim in the master narrative of international law's history. Scholars such as Antony Anghie and B.S. Chimni led the way by pointing at the role that international law played in the imperial subjection and exploitation of the global South by Europe and the West in the past as well as in the present, thus breaking the benign view of international law as a force of progress. Moreover, according to Anghie, modern international law itself was the product of the imperialist encounter of the nineteenth and early twentieth centuries. Rather than being the result of a simple transplantation and geographical extension of the Western law of nations, modern international

[38] Charles Henry Alexandrowicz, *An Introduction to the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Oxford: Clarendon Press 1967); Charles Henry Alexandrowicz, 'The Afro-Asian world and the law of nations', *Recueil des cours de l'Académie de droit international*, 123 (1968) 121–210; Charles Henry Alexandrowicz, *The European–African Confrontation. A Study in Treaty Making* (Leiden: Sijthoff 1973); David Armitage and Jennifer Pitts, 'This modern Grotius: an introduction to the life and thought of C.H. Alexandrowicz' in C.H. Alexandrowicz, *The Law of Nations in Global History*, ed. David Armitage and Jennifer Pitts (Oxford: Oxford University Press 2017) 1–31; Carl Landauer, 'The Polish rider: CH Alexandrowicz and the reorientation of international law, part I: Madras studies', *London Review of International Law*, 7 (2019) 321–52; Carl Landauer, 'The Polish rider: CH Alexandrowicz and the reorientation of international law, part II: declension and the promise of renewal', *London Review of International Law*, 9 (2021) 3–36.

[39] Yasuaki Onuma, 'Eurocentrism in the history of international law' in Yasuaki Onuma (ed.), *A Normative Approach to War. Peace, War, and Justice in Hugo Grotius* (Oxford: Clarendon Press 1993) 371–86; Yasuaki Onuma, 'When was the law of international society born?'; Yasuaki Onuma, *International Law in a Transcivilizational World* (Cambridge: Cambridge University Press 2017) 1–7.

law had been forged to service the imperial agenda of the Western powers. Hence even its most fundamental principles and doctrines, such as sovereignty, state recognition and territorial acquisition, as well as its underlying system of cultural values, were tainted by the West's imperialist ambitions. The adoption of this imperialist international law for the post-colonial world implied a continuation of its inherent bias and inequities and made it an agent of Western neo-imperialism.[40]

In uncovering the instrumental use of international law, this second generation of TWAIL scholars overhauled the traditional claims to universal validity for Western international law and reduced the European law of nations and nineteenth-century Western international law to just another regional system or tradition.[41] Dipesh Chakrabarty's plea to provincialize Europe expressed this, but also held another dimension. According to the Indian historian, the power of the universalist claims of European civilisation was such that they had been internalised in different regions and cultures of the world. In consequence, historic and current aspirations at westernisation and modernisation needed to be assessed in the context of the many local variations of what was understood to be European, Western and modern. Only then could a more just balance be reached between particularism and universalism.[42] In the last few decades, similar ideas have worked their way into the historiography of international law in the framework of studies about the global expansion of international law. Recent work has emphasised that the global expansion of Western international and domestic law was not a one-sided process of exportation and reception but also one of appropriation, variation and adaptation.[43]

The post-colonial turn in the historiography of international law, in combination with the critical historical writings of Western international lawyers, chief among them Martti Koskenniemi, has destroyed the credibility

[40] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press 2004); Antony Anghie, 'The evolution of international law: colonial and postcolonial realities', *Third World Quarterly*, 27 (2006) 739–53; Antony Anghie, 'Identifying regions in the history of international law' in Fassbender and Peters, *The Oxford Handbook of the History of International Law*, 1058–78.

[41] See also Martti Koskenniemi, 'The case for comparative international law', *Finnish Yearbook of International Law*, 20 (2011) 1–8.

[42] Dipesh Chakrabarty, *Provincializing Europe. Postcolonial Thought and Historical Difference* (Princeton: Princeton University Press 2000).

[43] Arnulf Becker Lorca, *Mestizo International Law. A Global Intellectual History 1842–1933* (Cambridge: Cambridge University Press 2014); Maria Adele Carrai, *Sovereignty in China. A Genealogy of a Concept since 1840* (Cambridge: Cambridge University Press 2019).

of the universalist claims of the traditional master narrative of the history of international law.[44] It is now more widely accepted that the European tradition of international law was just one among several traditions of international law, that the emergence of a global regime of international law between the late nineteenth century and the late twentieth was part of an imperialist assault by the West, and that this imperial 'encounter' and resistance against it deeply impact international law to this day. This leaves in place the sequence of European roots and global expansion, but divests the narrative of its universalist or eschatological claims. It also demotes current, global international law to just another transitional phase in the course of history.

Scale and Humility

Any scholar who commits to studying the past will at some point become, or be made aware, of the need to plot a course between the Scylla of antiquarianism and the Charybdis of presentism. Does one veer towards the danger of being swallowed by an arid antiquarianism that destroys all the current relevance of one's work? Or does one glide into the chasm where one eternally rehearses one's own thoughts and learns nothing more than one could by staring into the mirror? Is it that the past is 'a foreign country, they do things differently there',[45] or is it, as Marguerite Yourcenar (1903–87) claimed, just a dimension of the present – or was it the other way round?[46]

Since the 1990s, scholarly interest in the history of international law has spectacularly risen. In the span of thirty years, the field has turned from being neglected, underexplored and marginalised to an important area of interest

[44] Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University 2001) 11–97; George Rodrigo Bandiera Galindo, 'Martti Koskenniemi and the historiographical turn in international law', *European Journal of International Law*, 16 (2005) 539–59; Lustig, 'Governance histories', 861–3.

[45] After the phrase by a character from a novel by Leslie Pole Hartley, *The Go-Between* (London: Hamish Hamilton 1953); see David Lowenthal, *The Past Is a Foreign Country Revisited* (Cambridge: Cambridge University Press 2015) 3–4.

[46] 'Quand on parle de l'amour du passé, il fait faire attention, c'est de l'amour de la vie qu'il s'agit; la vie est beaucoup plus au passé qu'au présent. Le présent est un moment toujours court, et cela même lorsque sa plénitude le fait paraître éternel. Quand on aime la vie, one aime le passé parce que c'est le présent tel qu'il a survécu dans la mémoire humaine. Ce qui ne veut pas dire que le passé soit un âge d'or: tout comme le présent il est à la fois atroce, superbe, ou brutal, ou seulement quelconque'. Marguerite Yourcenar, *Les yeux ouverts. Entretiens avec Matthieu Galey* (Paris: Bayard Éditions 1980).

for international lawyers, international historians and, albeit somewhat less so, full-time legal historians.[47] The 'turn to history' among international lawyers, which started shortly after the end of the Cold War, has been followed in the new century by a 'turn to law' among intellectual historians and historians of international relations.[48] For the first time since the emergence of the modern historiography of international law, its exercise benefits from serious efforts from both its two major natural constituencies – law and history.

Since the 2010s, scholars of international law engaging with the study of their field's past have increasingly explored and debated historical methodologies and the tension between antiquarianism and presentism. With this, they have stumbled into a debate that general historians, as well as legal historians, have been waging for about a century. Whereas international lawyers often draw on methodological writings from historians, it seems to be less widely known that their concerns, positions and insights about the relative balance between law and history have for decades animated legal historians who study the history of domestic legal systems, the *jus commune* or the Anglo-American common-law tradition.[49]

The tension between antiquarianism and presentism frames the 'grand methodological debate' in the field of general history that has been mounted by early postmodernist thinkers since the 1920s. Postmodernism challenged the nineteenth-century belief in the possibilities of objective history writing. In the course of the nineteenth century, history moved from the confines of the private study of the *philosophe* or gentleman of means into the halls of an established academic discipline. The German historian Leopold von Ranke

[47] Preiser, *Völkerrechtsgeschichte*, 5; Johan Hendrik Willem Verzijl, 'Research into the history of the law of nations' in Johan Hendrik Willem Verzijl, *International Law in Historical Perspective*, vol. 1 (Leiden: Sijthoff 1968) 400–34, at 400.

[48] David Armitage, *Foundations of Modern International Thought* (Cambridge: Cambridge University Press 2013) 17–32; Ingo Hueck, 'The discipline of the history of international law', *Journal of the History of International Law*, 3 (2001) 194–217; Randall Lesaffer, 'International law and its history: the story of an unrequited love' in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.), *Time, History and International Law* (Leiden and Boston: Martinus Nijhoff 2007) 27–41; Martti Koskenniemi, 'Why history of international law today?', *Rechtsgeschichte*, 4 (2004) 61–6; Anne Orford, *International Law and the Politics of History* (Cambridge: Cambridge University Press 2021) 18–177.

[49] For recent discussions of the methodology in the historiography of international law that do draw on the work of legal historians in general – other than international legal history – see Valentina Vadi, 'International law and its histories: methodological risks and opportunities', *Harvard International Law Journal*, 58 (2017) 311–52; Valentina Vadi, 'Perspective and scale in the architecture of international legal history', *European Journal of International Law*, 30 (2019) 53–71.

(1795–1886), who has long been widely considered the father of modern historiography, held a positivist belief in the possibilities of reconstructing the past with veracity through the application of a range of established methodologies to the interpretation of primary sources. For Ranke himself, the disclosure of objective facts through primary sources did not exhaust the work of the historian, who still had to string these facts together into narratives and to explore their causalities.[50] Some of his later followers, such as, famously, the British historian John Dalberg, Lord Acton (1834–1902), went further in the profession of faith in objective history. Lord Acton expressed a close to perfect trust in history as an objective science when he proposed the publication of *The Cambridge Modern History*, the first of the Cambridge Histories, to the syndicate of Cambridge University Press. For him, bringing together a great number of leading – that is, British – historians was an apt way to offer a comprehensive survey of existing historiography, in itself a necessary step towards 'ultimate' history.[51]

During the interbellum period, some individual historians, such as the Italian Benedetto Croce (1866–1952), the French Marc Bloch (1886–1944) or the British Robin George Collingwood (1889–1943) generated attention with their attacks on the pretences of scientific history.[52] Between the 1950s and the 1990s, such allegations swelled into a flood of postmodernist criticism, which drew on such linguistic philosophies as those of, among others, Roland Barthes (1915–80) and Jacques Derrida (1930–2004).[53] The general

[50] Donald Bloxham, *Why History? A History* (Oxford: Oxford University Press 2020) 191–245; Georg G. Iggers, 'The intellectual foundations of nineteenth-century scientific history: the German model' in Stuart Macintyre, Juan Maiguashca and Attila Pok (eds.), *The Oxford History of Historical Writing*, vol. 4 (Oxford: Oxford University Press 2011) 41–58; Georg G. Iggers, *The German Conception of History. The National Tradition of Historical Thought from Herder to the Present* (Middletown, CT: Wesleyan University Press 1968); Donald R. Kelley, *Fortunes of History. Historical Inquiry from Herder to Huizinga* (New Haven and London: Yale University Press 2003); Leonard Krieger, *Ranke. The Meaning of History* (Chicago: University of Chicago Press 1977); Peter Novick, *That Noble Dream. The Objectivity Question and the American Historical Question* (Cambridge: Cambridge University Press 1988); Daniel Woolf, *A Global History of History* (Cambridge: Cambridge University Press 2011) 345–98.

[51] *The Cambridge Modern History. An Account of its Origin, Authorship and Production* (Cambridge: Cambridge University Press 1907) 10–12; see also A.W. Ward, G.W. Prothero and Stanley Leathes, 'Preface' in A.W. Ward, G.W. Prothero and Stanley Leathes, *The Cambridge Modern History* (Cambridge: Cambridge University Press 1902) v–viii.

[52] Marc Bloch, *The Historian's Craft* (New York: Vintage 1964); Robin George Collingwood, *The Idea of History* (Oxford: Oxford University Press 1946); Benedetto Croce, *History as the Story of Liberty* (1941, Indianapolis: Liberty Fund 2000).

[53] Roland Barthes, *The Rustle of Language* (New York: Hill and Wang 1986); Jacques Derrida, *Of Grammatology* (Baltimore: Johns Hopkins University Press 2016).

underlying tenet of the postmodernist critique was that the past – the object of study of history – was irretrievably lost and could only be mentally constructed through the mediation of primary sources – mostly textual and inevitably subjective – and the historian's own subjective understanding of those. Towards the end of the twentieth century, the postmodernist critique turned to despair among some historians about the usefulness of their field and its methodology and led to a fear of reaching the level of relativism or nihilism on the scaffold of 'anything goes'.[54]

However, mainstream history has retained or recovered confidence in the possibilities of the application of historical methodology. Today, few if any historians would pretend that it is possible to write objective or definite history and the vast majority accept that any attempt to do so is doomed to failure and to being overhauled. Nevertheless, the field still defends its legitimacy and autonomy as an academic discipline – one which is in fact blossoming as never before in many parts of the world. Notwithstanding the fact that mainstream historians acknowledge that subjectivity and presentism are ineradicably part of the historian's reconstruction of the past – the postmodernist *acquis* – they insist on the rigorous application of source critique and certain basic tenets of historical methodology as a way of making a historical reconstruction that is as accurate a picture of the past as possible. If doing history is like making a jigsaw puzzle of which only a few of the pieces are left – to borrow a metaphor from the Cambridge historian Richard Evans – then one result will be more complete and closer to the original picture than another. Historians have traded their pretences of objectivity not for an 'anything-goes' subjectivism, but for the belief that history writing is a responsible effort at constructing intersubjective reality. All this does not imply denying the inevitability of the impact of subjective, present concerns, agendas or limitations on the part of the historian, or of the authors of her sources. On the contrary, it demands that the historian map and explore these, account for them, and try to minimise their impact. This demands rigour, self-criticism, patience and, above all, humility. Whereas modesty

[54] Frank Ankersmit, *Narrative Logic. A Semantic Analysis of the Historian's Language* (Leiden: Martinus Nijhoff 1983); Frank Ankersmit, 'Historiography and post-modernism', *History and Theory*, 28 (1989) 137–53; Robert B. Berkhofer Jr, *Beyond the Great Story. History as Text and Discourse* (Cambridge, MA and London: Harvard University Press 1995); Elizabeth Deeds Ermath, *Sequel to History. Postmodernism and the Crisis of Representational Time* (Princeton: Princeton University Press 1992); David Harlan, *The Degradation of American History* (Chicago: University of Chicago Press 1997); Paul Ricoeur, *Memory, History, Forgetting* (Chicago and London: University of Chicago Press 2004).

may not necessarily be conducive to achieving a great career in a world where visibility and reputation count for a lot, humility is an essential tool in the box of the historian. It is necessary not to impose one's own views on the reconstruction of the past any more than one can avoid; to realise that, regardless of one's efforts at self-reflection, one's most basic subjective assumptions may elude the historian and become the platform for later generations of history writers to revision older histories. If all history writing should be critical, it should be self-critical first.[55] Choosing to become a historian is choosing to attempt the impossible. The best one can hope for in the long run is to become a footnote in someone else's revisions. However, the intellectual rewards are as great as those of any open-minded experience of human life and the world, something worthy of sharing with one's readers. Moreover, the historian's reconstructions of the past may serve as tools for non-historians, academics from other disciplines and non-academics, to make sense of the present and grasp at the future. In his intellectual biography, Sir John Elliott wrote,

> The attempt to pin down the past is an elusive enterprise, and every serious historian is painfully aware of the gulf between the aspiration and its realization. Yet the attempt to bridge this gulf is as exciting as it is frustrating. The excitement comes from the challenge of attempting to break loose from contemporary attitudes and assumptions, while simultaneously recognizing the constraints they impose. The sensation, after immersing oneself in an earlier age, of being within touching distance of its inhabitants and at least acquiring a partial understanding of their behaviour and intentions, is a powerful one, and makes historical research an immensely rewarding experience.[56]

There is another level of humility that flows from the postmodernist *acquis* in mainstream history: the realisation that the historical discipline has no monopoly, nor ought to have a monopoly, on scholarly engagements with

[55] Bloxham, *Why History*, 304–58; E.H. Carr, *What Is History? With a New Introduction by Richard J. Evans* (1961, Basingstoke: Palgrave 2001); Richard J. Evans, *In Defense of History* (New York and London: W.W. Norton and Company 1999), for the metaphor of the jigsaw puzzle, 77; John Lewis Gaddis, *The Landscape of History. How Historians Map the Past* (Oxford: Oxford University Press 2002); Georg G. Iggers, *Historiography in the Twentieth Century. From Scientific Objectivism to the Postmodern Challenge* (Middleton: University Press of New England 1997); Samuel Moyn, 'Legal history as a source of international law: the politics of knowledge' in Samantha Besson and Jean d'Aspremont (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press 2017) 301–18.

[56] John H. Elliott, *History in the Making* (New Haven and London: Yale University Press 2012) xi–xii.

the past. The historical discipline and methodology are distinguished from other disciplines' engagements with the past by the claim that the historian's consciously chosen agenda is the faithful reconstruction of the past, while she acknowledges that this is ultimately unattainable and that she will never be able to shed ulterior motives that are inspired by her own concerns and circumstances.[57] There exist, however, other scholarly engagements with the past that have legitimacy on the basis of their own chosen purpose. One of these is the legal.

Historical methodology does not exhaust the different sorts of legitimate engagement scholars may have with past law, including past international law. Matthew Craven introduced a threefold classification of scholars' engagement with past international law: international law in history, history of international law and history in international law.[58] This simple classification, which can be applied to law in general, is a helpful tool to place scholars' various entanglements with the law and its past on a spectrum running from the historical to the legal, and to map the borderlands between those disciplinary approaches.[59]

On the far historical side of the spectrum stands 'law in history'. This category covers historical studies that do not have law as their primary subject but discuss the law as part of the wider social context. These include studies that make use of legal sources for finding non-legal information, such as Emmanuel Le Roy Ladurie's (1929–2023) use of inquisition files for his study of social relations in a village in the Pyrenees about 1300,[60] as well as studies that look at law as one determinant among several for the subject under scrutiny. Jenny Benham's work on the practice and culture of medieval peacemaking or Rémy Ambühl's book on the practice of ransom during the Hundred Years War are recent examples from the realm of international relations.[61]

[57] Constantin Fasolt, *The Limits of History* (Chicago: University of Chicago Press 2004) 3–45 and esp. 221–2.

[58] Matthew Craven, 'Introduction: international law and its histories' in Craven, Fitzmaurice and Vogiatzi, *Time, History and International Law*, 1–25, at 7.

[59] Randall Lesaffer, 'Law between past and present' in Sanne Taekema and Bart van Klink (eds.), *Law and Method* (Tübingen: Mohr Siebeck 2011) 133–552, at 133–7.

[60] Emmanuel Le Roy Ladurie, *Montaillou. Village occitan de 1294 à 1324* (Paris: Gallimard 1975).

[61] Rémy Ambühl, *Prisoners of War in the Hundred Years War. Ransom Culture in the Late Middle Ages* (Cambridge: Cambridge University Press 2013); Jenny Benham, *Peacemaking in the Middle Ages. Principles and Practice* (Manchester and York: Manchester University Press 2011). Other examples on more recent history include Maartje Abbenhuis, *An Age of Neutrals. Great Power Politics* (Cambridge: Cambridge University Press 2014); Susan Pedersen, *The Guardians. The League of Nations and the*

On the opposite, the legal, side of the spectrum stands 'history in law'. 'History in law' is an inherent part of legal scholarship and practice. This is in particular the case for the state-based positivism that has dominated legal scholarship and legal education from the end of the nineteenth century to the end of the twentieth, and still proves resilient in many law schools around the world. Under the paradigm of this modern legal positivism, law – whether national or international – is what the state(s) decide(s) it to be. Hence it is based on actions and decisions by state officials, whether legislators, governments, bureaucrats, diplomats or judges; derives its authority from constitutional processes of lawmaking; and is to be found in formal legal sources. Tracing the original formal source of law, debating its authentic meaning and following the path of its evolving interpretations are common legal argumentation techniques. Questioning the origins of a certain legal rule or institution from this perspective does not fall under the aegis of the historical discipline and normally makes scant use of historical methodology. Its purpose is not to explore the past in order to gain insight into the past or the present, but to use it as a source of authority in a current debate about the existence or interpretation of a given legal rule. Questioning the past of the law in such a manner is a legitimate tool in the box of the legal scholar within the limits of her own legal purpose, and (international) lawyers have justly defended its autonomy from historiography.[62]

'Law-in-history' research has been given powerful purchase under the influence of historical jurisprudence. The impact of historical jurisprudence on legal scholarship was particularly significant near the end of the nineteenth century under the influence of Savigny, the German historical school and Pandect science. Drawing on the philosophies of history of, among others, Johann Gottfried von Herder (1744–1803) and Georg Wilhelm Friedrich Hegel (1770–1831), the Berlin professor of Roman law developed his theory of historical jurisprudence. Savigny articulated his thoughts in a pamphlet, *Vom Beruf unserer Zeit zur Gesetzgebung und Rechtswissenschaft* (1814), in which he opposed a speedy codification of German law. Savigny

Crisis of Empire (Oxford: Oxford University Press 2015); Leonard V. Smith, *Sovereignty at the Paris Peace Conference of 1919* (Oxford: Oxford University Press 2018).

[62] Anne Orford, 'International law and the limits of history' in Wouter Werner, Marieke de Hoon and Alexis Galan (eds.), *The Law of International Lawyers. Reading Martti Koskenniemi* (Cambridge: Cambridge University Press 2017) 297–320, with reference to Fasolt, *The Limits of History*; Orford, *International Law and the Politics of History*, 178–252. See also Laura Kalman, 'Border patrol: reflections on the turn to history in legal scholarship', *Fordham Law Review*, 66 (1997) 87–124, at 87–9.

resisted the idea that a legal system could be intellectually construed through mere rational deduction from the principles of natural law, as adherents of the modern school of natural law had proposed. In his view, the law of a nation arose from its history, much like its language. Taking a clue from Hegel, Savigny considered the historical development of law not to be an indeterminate process without an end point, but the gradual unfolding of insight in the perfected – complete, consistent, coherent – legal system that stood as its *telos*.

Under Savigny's theory of historical jurisprudence, at some point in history the care for the progression of the law had been transferred from the people to the class of learned jurists – university-schooled practitioners and, above all, law professors such as himself. To them was entrusted the task of gradually moulding the law into a system. In Germany, this had been done since the end of the Middle Ages through the learned study of Roman law. Here, however, Savigny, made a peculiar move in his theory. Rather than continuing the path of the reception and adaptation of Roman law through the *usus modernus Pandectarum* that had been dominant since the seventeenth century, Savigny advocated diverting this historical process and reverting to the original sources of Roman law, the codification by Justinian (r. 527–565), and even more in particular the Digest (or Pandects). For him, this was necessary to find the pure legal concepts and principles that were to form the building blocks and guidelines for erecting the system of German law.[63] Savigny endeavoured to do this himself in his massive *System des heutigen römischen Rechts*.[64] His followers of the historical school and the school of Pandect science continued on this path, finally to decide – after the unification of Germany created the necessary political context – that the system was ready for its consolidation through codification. The German Civil Code (Bürgerliches Gesetzbuch, 1900) that resulted carried the deep imprints of the leading Pandectist, Bernard Windscheid (1817–92).[65]

Savigny and the Pandect scientists had a massive influence within and without Europe. Within Germany and much of the civil law world, Pandect science continued a long engagement with Roman law that was ahistorical in nature and went back to the rediscovery of the Digest in the eleventh

[63] Friedrich Carl von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence* (1814, London: Littlewood 1831, reprint Clark, NL: Lawbook Exchange 2010).
[64] Friedrich Carl von Savigny, *System des heutigen römischen Rechts* (8 vols., Berlin: Veit 1840–9).
[65] Bernard Windscheid, *Lehrbuch des Pandektenrechts* (2 vols., Düsseldorf: Julius Buddeus 1862–70).

century. Much as with the scholastic glossators and commentators of the Late Middle Ages or the adherents of the *usus modernus Pandectarum* and the modern school of natural law of the seventeenth and eighteenth centuries – and in radical opposition to what the humanists had advocated – the nineteenth-century Pandectist study of the Justinian text canon was targeted at understanding these texts neither within their own contingent context, nor for their evolving historical interpretations, but as a source of immutable, 'pure' conceptions and principles of law.[66] In the world of common law, and in particular in the United States, Savigny likewise left a deep imprint. There, his programme, whose entry was smoothed by the seventeenth-century English tradition of historical jurisprudence of Edward Coke (1552–1634), John Selden (1584–1654) and Matthew Hale (1609–76), was translated into a programme of searching precedents and case law for the stable core of conceptions and principles in the common law.[67]

The third category, 'history of law', or legal history in the strict sense, covers the broad middle ground of the spectrum. It forms part of the historical discipline as its primary purpose is the reconstruction of the past. It differs from 'law in history' as its primary subject is the law. Legal history, even in this strict sense as one of the three different entanglements between law and history, remains a broad field that houses many different perspectives. One of the binary *summae divisiones* that legal historians use, among others,[68] is that between internal and external legal history. Internal legal history considers past law on its own, as an autonomous, self-sufficient phenomenon, and studies the evolution of law within its own logic and dynamics. It 'stays as much as possible within the box of distinctive appearing legal things'.[69] It raises legal questions, and uses almost exclusively legal sources. It stands towards the legal side of the middle of the spectrum.

[66] Markus D. Dubber, 'New historical jurisprudence: legal history as critical analysis of law', *Critical Analysis of Law*, 2 (2015) 1–18; Markus D. Dubber, 'Legal history as legal scholarship: doctrinalism, interdisciplinarity, and critical analysis of law' in Dubber and Tomlins, *Legal History*, 99–119, at 101–7; Fasolt, *The Limits of History*; James Gordley, *The Jurists. A Critical History* (Oxford: Oxford University Press 2013); Randall Lesaffer, *European Legal History. A Cultural and Political Perspective* (Cambridge: Cambridge University Press 2009); Stein, *Roman Law in European History*.

[67] Harold J. Berman, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, MA and London: The Belknap Press 2003) 199–305; Gordon, 'The common law tradition', 18–24; Robert W. Gordon, 'Historicism in legal scholarship' in Gordon, *Taming the Past*, 183–219; Robert W. Gordon, 'The past as authority and a social critic: stabilizing and destabilizing functions of history in legal argument' in *ibid.*, 282–316, at 282–6.

[68] For other divisions, see Vadi, 'International law and its histories', 328–35.

[69] Gordon, 'The common law tradition', 19.

External legal history considers the law within its wider societal context. It questions the interaction between law and society, between legal and societal evolutions, as well as their mutual impact. It stands on the historical side of the middle of the spectrum.[70]

From its establishment as an academic discipline in the nineteenth century to the 1980s, legal history – which traditionally focused on either Roman law and the *jus commune*, the Anglo-American common-law tradition or national legal histories – has been dominated by the internal perspective.[71] Here, as in historical jurisprudence, the influence of Savigny was telling. Much as his friend Leopold von Ranke may be considered the founder of modern historiography as an academic discipline, the same may be said about Savigny for legal history.[72] Apart from his jurisprudential work, Savigny also committed to writing legal history. His most significant contribution is a multi-volume history of the medieval discovery and study of Roman law at European universities.[73] Much in line with his legal theory, he considered the study of the historical evolution of legal doctrine by jurists – scholars and practitioners – a valuable exercise to understand and aid the progress of the law. The introduction of the German Civil Code in 1900 liberated legal history, and its flagship the study of Roman private law, from the clutches of Pandect science and allowed it to set a more historical course. Against a drive towards the study of Roman law in its context of origins – the Roman world of the Mediterranean in Antiquity – emerged a more powerful countermovement to embed Roman law in a grand narrative of the development of the civil law tradition from its Roman sources through its medieval rediscovery and early modern transformation to the national codifications of private law.[74] The influence of Savigny and the translation of his historical programme into a mother story about the development of the learned law of

[70] *Ibid*., 19–20; Dirk Heirbaut, 'A tale of two legal histories: some personal reflections on the methodology of legal history' in Dag Michaelsen (ed.), *Reading Past Legal Texts* (Oslo: Unipax 2006) 91–112; David J. Ibbetson, 'What is legal history a history of?' in Andrew Lewis and Michael Lobban (eds.), *Law and History* (Oxford: Oxford University Press 2003) 33–40.

[71] Joshua Getzler, 'Legal history as doctrinal history' in Dubber and Tomlins, *Legal History*, 171–92; Gordon, 'The past as authority and social critic'.

[72] Fasolt, *Limits of History*, 26–7.

[73] Friedrich Carl von Savigny, *Geschichte des römischen Rechts im Mittelalter* (6 vols., Heidelberg: Mohr & Zimmer 1815–31).

[74] Helmut Coing, *Europäisches Privatrecht* (2 vols., Munich: C.H. Beck Verlag 1985–9); Paul Koschaker, *Europa und das Römische Recht* (Munich and Berlin: Biederstein Verlag 1947); Franz Wieacker, 'The importance of Roman law for Western civilization and Western legal thought', *Boston College International and Comparative Law Review*, 4 (1981) 257–81; Franz Wieacker, *History of Private Law in Europe. With Particular*

Roman and canon law – the *jus commune* – by later national and European legal historians of the later nineteenth and the twentieth centuries consolidated the domineering position of doctrinal and intellectual legal history. The focus of legal historians remained, within the civil law world as well as in the common-law world, with the study of doctrine and lawyers, legal scholarship and legal institutions. Moreover, there was a strong tendency towards evolutionary history, the tracing of the evolution of doctrines, scholarship and institutions over long stretches of time. As legal history in the strict sense was and is by and large practised by scholars working and teaching at law schools, the ulterior motive of much of its study is to trace the historical roots of current law.[75]

The internal perspective has also dominated the historiography of international law and did so almost until the end of the twentieth century. As in other branches of legal history, there was a strong tendency towards the evolutionary tracing of doctrinal history and the history of ideas, with an even narrower focus on historical scholarship over practice.[76] A countermovement to give preference or at least more space to practice emerged from the German-speaking world, but did not grow into an important stream until the 1990s.[77]

The internal perspective proved a safe house for the master narrative of international law and its statist, Eurocentric, universalist and positivist groundwork. As the law derives its authority from the formal process of lawmaking by the state, there is little need to question its societal determinants or its effectiveness in attaining the desired societal goals. Hence a mere legal perspective on its origins and evolution suffices. The absence of a

Reference to Germany (Oxford: Clarendon Press 1995). See Randall Lesaffer, 'The birth of European legal history' in Heikki Pihlajamäki, Markus D. Dubber and Mark Godfrey (eds.), *The Oxford Handbook of European Legal History* (Oxford: Oxford University Press 2018) 84–99; Reinhard Zimmermann, *Roman Law, Contemporary Law, European Law. The Civilian Tradition Today* (Oxford: Clarendon Press 2001).

[75] Paul Koschaker, *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft* (Munich: C.H. Beck Verlag 1938).

[76] E.g. Robert Redslob, *Histoire des grands principes du droit de gens depuis l'antiquité jusqu'à la vieille de la grande guerre* (Paris: Rousseau 1923); Ernst Reibstein, *Völkerrecht. Eine Geschichte seiner Ideen in Lehre und Praxis* (2 vols., Freiburg and Munich: Verlag Karl Alber 1957–63); James Brown Scott, *The Spanish Origins of International Law. Francisco de Vitoria and His Law of Nations* (Oxford and London: Clarendon Press and Humphrey Milford 1934).

[77] Jörg Fisch, *Krieg und Frieden im Friedensvertrag. Eine universalgeschichtliche Studie über Grundlagen und Formelemente des Friedensschlusses* (Stuttgart: Klett-Cotta 1979); Grewe, *The Epochs of International Law*; Koskenniemi, 'History of international law histories', 958–67.

legislative authority or, for most of its history, of a judiciary is compensated through a focus on the interpretations of the law by learned jurists, and in the absence of those, by other scholars, such as theologians or political thinkers, writing about the law. The internal–positivist combination excuses the historian of international law from questioning the ideological assumptions under the universalist claims of the master narrative.

In view of the focus on doctrine and ideas in the historiography of international law, it comes as no surprise that the field took its inspiration for debating the turn to context, and thus to external legal history that occurred from the 1990s onwards, from the field of the history of ideas and of political thought. To this day, the turn to context is still discussed and problematised by international lawyers and international legal historians *pro* and *contra* Quentin Skinner's views.[78] In the late 1960s, Skinner reacted against the prevailing stream in the history of political thought of stringing together canonical texts into a grand exercise of tracing the progressive articulation of 'timeless wisdoms' and 'universal ideas'. He proposed a methodology that aimed at disclosing the authentic meaning of the text for its author by delving into the context of the author's life, agenda and intellectual outlook.[79]

The boom of the history of international law since the 1990s involved a turn to context and a change of perspective from internal to external history. This has occurred in the writings on its intellectual history,[80] as well as through the expansion of its scope to more practice-oriented studies and the rise of 'international-law-in-history' studies.[81] The critical revision of the field's traditional master narrative by TWAIL, critical legal studies (CLS) and other historians is a grand exercise in historicising by contextualising.[82] In this, international legal history has belatedly and sometimes unwittingly followed in the footsteps of domestic legal history, and especially domestic

[78] Anne Orford, 'On international legal method', *London Review of International Law*, 1 (2013) 166–97; and the reaction by Lauren Benton, 'Beyond anachronism: histories of international law and global legal politics', *Journal of the History of International Law*, 21 (2019) 7–40; and Andrew Fitzmaurice, 'Context in the history of international law', *Journal of the History of International Law*, 20 (2018) 5–30.

[79] Quentin Skinner, 'Meaning and understanding in the history of ideas', *History and Theory*, 8 (1969) 3–53, at 3; Quentin Skinner, 'The limits of historical explanations', *Philosophy*, 41 (1966) 199–215.

[80] Koskenniemi, *Gentle Civilizer*, 6–10; Martti Koskenniemi, 'Imagining the rule of law: rereading the Grotian "Tradition"', *European Journal of International Law*, 30 (2019) 17–52, at 17–19; Koskenniemi, *To the Uttermost Parts of the Earth*, 1–12.

[81] De la Rasilla, *International Law and History*, 41–74.

[82] Orford, *International Law and the Politics of History*, 315–20.

legal history in the US and much of the – non-European – anglophone world, where the turn to external legal history started already in the 1950s.[83] The turn to context in (international) legal history is probably more than ephemeral fashion, but a dimension of the fundamental break with the paradigm of state-based positive law. Different forms of legal realist discourse,[84] the process of globalisation and the rise of a novel legal pluralism that has not seen an equal since the triumph of the nation state in the nineteenth century force lawyers to study the law beyond the authority of the state and research its societal relevance and its efficiency. The turn to external or contextual legal history is yet another dimension of the rise of 'law and . . .' studies. Moreover, it steps in time with similar drives in other fields of history. Legal history, and international legal history in particular, have proliferated and diversified in terms of approaches, perspectives and methodologies by borrowing from novel streams in general historiography such as global history, microhistory, subaltern history and history from below.[85]

However, dangers of overextension of the new contextualist paradigm may lurk here, and not only in the minds of worried (international) lawyers.[86] From the realm of international law, Anne Orford and Martti Koskenniemi have voiced concerns that overstated contextualism may damage the relevance of historical work on international law for the present. They fear that radical adherence to a contextualist paradigm for historical studies may lead to the compartmentalisation of the past into separate periodical boxes and may delegitimise diachronic discourse that traces the historical pedigree of current law, values or ideas. They discern a return to an objectivist view of history that covers up the political nature of past

[83] John Willard Hurst, *The Growth of American Law. The Law Makers* (Boston: Little, Brown 1950); Justin Desautels-Stein, 'A context for legal history, or, this is not your father's context', *American Journal of Legal History*, 56 (2016) 29–40; Catherine L. Fisk and Robert W. Gordon, '"Law as . . .": theory and method in legal history', *U.C. Irvine Law Review*, 1 (2011) 519–42; Gordon, 'The common law tradition', 33–49; Robert W. Gordon, 'Socio-legal history's pioneer: the work of James Willard Hurst' in Gordon, *Taming the Past*, 77–86; Robert W. Gordon, 'Critical legal histories' in *ibid*., 220–81; Kunal Parker, 'Law "in" and "as" history: the common law in the American polity, 1790–1900', *U.C. Irvine Law Review*, 1 (2011) 587–609.

[84] Orford, *International Law and the Politics of History*, 206–17.

[85] Carlo Ginzburg, 'Our words, and theirs: a reflection on the historian's craft, today', *Cromohs Cyber Review of International Historiography*, 18 (2013) 97–114; Anna Green and Kathleen Troup, *The Houses of History. A Critical Reader in History and Theory* (2nd edn, Manchester: Manchester University Press 2016); Francesco Trivellato, 'Is there a future for Italian microhistory in the age of global history?', *California Italian Studies*, 2 (2011) n.p.

[86] Dubber, 'New historical jurisprudence'; Ibbetson, 'What is legal history'; Steven Wilf, 'Law/text/past', *U.C. Irvine Law Review*, 1 (2011) 543–64.

international law as well as its historiography.[87] Such concerns should be taken as flashlights of danger by contextual historians, all the more so because the dangers can be avoided.

First, historians ought to accept, and most do, that the historical method is just one legitimate method for scholars to engage with the past and that it does not exhaust the law's engagement with its past.[88] There is an autonomous place for historical jurisprudence and other studies of 'history in law' that derives from the law's need for authority and the lawyer's need to find the unchanging and transcendent, or at least endurably stable, core in legal ideas, conceptions and doctrines. The lawyer's primary focus differs from the historian's primary focus on processes of constant change and endless diversity. At the same time, this schematic, binary division between a lawyer's and a historian's focus should not make us imagine that the 'history-in-law' approach exhausts lawyers' engagements with past laws. A lawyer's need for consent about authority does not preclude sensitivity to the context of the law at any given time or place, and actually often includes the operationalisation of diverse contingent meanings in legal debates and legal practice. A core business of the lawyer, both as a practitioner and as an academic teacher and writer, is the application and adaptation of general principles and rules to myriads of concrete, distinctive cases.[89] Current lawyers can and do make use of insights from contextual history within debates about the meaning of a given concept, rule or doctrine, while historians should accept that their own conclusions about the contingent past may become integrated into the lawyer's discourse and possibly remoulded in the process. From their side, lawyers should accept that a 'history-in-law' discourse, used in the context of arguing about current law, may not constitute the most accurate extant depiction of the past and should not be presented as the full extent of what a historical perspective can deliver. Nor ought they to allow themselves to believe that a historian's claim that her history is more accurate than her predecessor's entails a claim to full accuracy or objectivity, even if current publication culture sometimes drives them to make all-too-grand and generalised statements. The legal and historical approaches are both legitimate within the confines of their own purposes,[90] but they are also connected and, in part, intertwined. If the past is a house that has fallen into ruins, the

[87] Martti Koskenniemi, 'Vitoria and us: thoughts on critical histories of international law', *Rechtsgeschichte*, 22 (2014) 119–38; Orford, 'On international legal method'.
[88] Fasolt, *The Limits of History*; Orford, 'International law and the limits of history'.
[89] Orford, *International Law and the Politics of History*, 178–284. [90] *Ibid*., 11.

historian searches the remains in order to draw a picture of what it was; the lawyer, however, picks up some of the debris to use for her new house, where she goes to live.

Second, these concerns by (international) lawyers have also to be addressed within the ambit of 'history-of-law', or 'law-in-history', studies, for that matter. It is undoubtedly true that the turn from internal to external legal history has come, inside and outside the field of international law, alongside a change in the scale of history writing: from macro to micro; from grand narratives over time towards studies of a 'short past'; from diachronic, evolutional to synchronic, contingent histories. Here, legal history has followed and is following, yet again, a preceding tendency in general historiography.[91] However, as the collected works of many (international) legal historians prove, the choice for contextual history of the short past does not preclude the very same historian also writing evolutionary history. Skinner himself holds his greatest claim to fame in his grand history of European political thought from the Late Middle Ages to the end of the sixteenth century.[92] Moreover, although it often seems much easier and less time-consuming to limit the scale of contextual history to the short past and to limit the perspective of long-past narrations to the internal perspective, this is not necessarily the case.

As Andrew Fitzmaurice and Lauren Benton have argued, historians have generally not upbraided lawyers for drawing lines from the past into the present, nor for harvesting insights on the past for present-day arguments. In the words of Fitzmaurice, historians have rather criticised an approach 'which focuses upon the use of the present to produce distorted understandings of the past rather than upon using the past to understand the present'.[93] The latter is, ultimately, the purpose of all but the most antiquarian history writing. What historians generally upbraid is just one among different kinds of evolutionary history on legal developments that tends so much towards presentism that it crosses the border from historical into legal discourse. This is sometimes indicated by the sobriquet of genealogical history. Like making a genealogical family tree, it restricts the study of the past to those events,

[91] Elliott, *History in the Making*, 197–8; Jo Guldi and David Armitage, *The History Manifesto* (Cambridge: Cambridge University Press 2014) 38–60; Valentina Vadi, 'The power of scale: international law and its microhistories', *Denver Journal of International Law and Policy*, 46 (2016) 315–48.

[92] Quentin Skinner, *Foundations of Modern Political Thought* (2 vols., Cambridge: Cambridge University Press 1978); see Benton, 'Beyond anachronism', 10–17.

[93] Fitzmaurice, 'Context in the history of international law', 15.

ideas or institutions that carry progeny into the present. While such a restricted view does not disqualify it as historiography, often genealogy in legal history, or in intellectual history, goes along with the search for the timeless, transcendent core of an idea to which universal value is attached, and/or a determination to search the past to justify the present.[94] That does not disqualify it as a sound method of scholarship, but it does move it towards the legal side of the spectrum. What disturbs historians is not so much that this is done, but that the results of this selective reading of a historic text or event – like the infamous Westphalian myth – are presented or read as a purposed reconstruction of the past.[95] Finally, the turn to context does not restore illusions about objective history and has not destroyed the postmodernist *acquis* among historians, nor should it by itself drive lawyers towards a new legal formalism. Most historians will have no problems with Martti Koskenniemi's claim that each contextualisation involves a selection of 'what context?' and that this is inevitably determined by the historian's own world views and agenda. Nor would they dispute Anne Orford's statement that any reconstruction of past law presupposes a choice for a particular conceptualisation of law, that will almost inevitably be informed by present-day theories or strategies. They would, however, react if this were taken to mean that, by consequence, 'anything goes'.[96]

The current proliferation of synchronic contextual studies that seek to reconstruct, as faithfully as possible, the past as it was for the people living then is a great boon to the historiography of international law. However, these should not constitute the sole scale on which international legal history is done. There are at least three important layers that may work together to

[94] Paul D. Halliday, 'Legal history: taking the long view' in Dubber and Tomlins, *Legal History*, 323–41, at 328; Ian Hunter, 'Global justice and regional metaphysics: on the critical history of the law of nature and nations' in Ian Hunter and Shaunnagh Dorsett (eds.), *Law and Politics in British Colonial Thought* (New York: Palgrave 2010) 11–29; Ian Hunter, 'The figure of man and the territorialisation of justice in "Enlightenment" natural law: Pufendorf and Vattel', *Intellectual History Review*, 23 (2013) 289–307, at 289–90; Lesaffer, 'International law and its history'.

[95] Lesaffer, 'Law between past and present', 137–42, where an example is made of the blurring of ahistorical and historical readings of Westphalia in Leo Gross, 'The Peace of Westphalia, 1648–1948', *American Journal of International Law*, 42 (1948) 20–41.

[96] Koskenniemi, 'Vitoria and us', 127–8; Orford, *International Law and the Politics of History*, 253–84, esp. 256–7; Fitzmaurice, 'Context in the history of international law', 10–14. In that sense, lawyers who would use the turn to historic contextualism as a way to restore an objectivist basis for law, and return to a kind of positivist formalism, would not find an obvious support in the epistemological reflections of the vast majority of contextual historians; for a reflection from the legal perspective, see Orford, *International Law and the Politics of History*, 284–96.

give us a fuller picture of international law's past. Taking the example of a doctrine – let us say the doctrine of the freedom of the seas as articulated by Grotius in *Mare liberum* (1609) – there are three significant layers of 'reading': first, there is the attempt to reconstruct Grotius' own understanding; second, there are the evolving interpretations of the doctrine of the freedom of the sea by later writers, whether they claimed that their interpretations constitute a timeless, transcendent doctrine to conform to the authentic meaning of Grotius or acknowledged it as another contingent understanding of the doctrine; and third, there is the examination of the evolving historiographical interpretations of what constituted the so-called authentic understanding of Grotius' doctrine.[97] The first two are historiographical exercises; the third is an exercise in meta-history, in the history of history writing. Their greatest rewards, however, would come from their combination.[98] A better understanding of Grotius' original meaning may help map later writers' amendments and additions, while a better understanding of these later interpretations may help find the particular in Grotius. Behind these three exercises lurks a fourth one, each and every time: that is humbly to question and evaluate one's own present ideas and assumptions.[99]

The Tortuous Path to a Global History of International Law

The combined efforts of TWAIL and CLS, as well as of numerous (legal) historians, have destroyed the universalist claims of the traditional master narrative of the history of international law by historicising it and exposing its state-centric and Eurocentric biases. They have not, however, replaced it with an alternative dominant grand narrative. Rather than displacing the European-origins–global-expansion scheme from its basic architecture, the discipline has unveiled the scheme's roots in the liberal and imperialist ideologies and agendas of the late nineteenth to late twentieth centuries. If any common thread has been proposed, it has been the embracing of the increasing proliferation and pluralism of the *histories* of international *laws* in

[97] For an exercise in these two layers on Bartolus of Sassoferrato (1314–1357) and his interpretation by Hermann Conring (1606–81), see Fasolt, *Limits of History*.

[98] De la Rasilla, *International Law and History*, 97.

[99] Peter Gordon, 'Contextualism and criticism in the history of ideas' in Dominick LaCapra and Steven L. Kaplan (eds.), *Modern Intellectual History. Reappraisals and New Perspectives for the Twenty-First Century* (New York: Oxford University Press 2013) 32–55; Vadi, 'Perspective and scale'.

terms of topics, lenses, perspectives, approaches and methodologies. If there is a unifying ambition, it is the desire to transcend the state-centric and Eurocentric reduction of traditional historiography, and to move – in step with other fields of general and legal history – towards global histories of international law.

The aspiration to develop global perspectives in the history of international law comes with the acknowledgement that, even if the European and Western tradition of international law had the greatest relative impact on the formation of modern international law, it is just one of several traditions of international law from world history and just one of several that had an impact. Nevertheless, attempts at studying non-European and pre-Renaissance international laws have rarely been made by international lawyers, while the work of specialised historians often remains under the radar of mainstream historiography of international law and rarely finds inclusion in general debates. The focal point of debates and studies in the context of the emerging global perspectives in the history of international law lies with the imperial encounter between the West and the rest, from the late or mid-nineteenth century onwards, while the interest in the early modern European law of nations also endures and waxes.

With the call for a turn to global perspectives in the history of international law, the field writes itself into a much wider historiographical trend. Global history as a sub-field and trend in history has begun to emerge in the 1980s–1990s and has been on the rise ever since. There is a large measure of terminological indeterminacy. One significant trend is to use the term 'world history' as the broad, general category and to use other terms such as 'universal history', 'comparative history' and 'global history' as specific appearances of world history. 'Global history' is the preferred term to refer to the new trend that expresses historians taking conscience of globalisation as a defining process of our own time. Global history started as a revision of the previously dominant paradigm of world history; that is, universal history as centred around the idea of the progressive expansion of European civilisation and its political, economic and legal system. Global history is first and foremost a new lens through which to look at world history by decentring and 'provincializing' Europe, the state and the nation as the main carriers of human evolution. It not only focuses, more than other forms of world history before, to paraphrase Dominic Sachsenmaier, on one's own heritage, but above all wants to include the other.[100] In this respect,

[100] Sachsenmaier, 'The evolution of world histories', at 57.

the gradual revision of the historiography of international law of recent years is an application of the tenets of global history.[101]

According to Patrick Conrad, there are three major approaches to global history. The first is to offer a synthesis of everything that happens worldwide. By itself, this is not new but other than was the case for nineteenth- or twentieth-century world history this is now done under the perspective of decentring Europe and its economic and political legacies. The second approach focuses on transregional interactions, connections and networks through various kinds of actors. The history of globalisation itself as a historical process would fall under this heading. The third approach is to study local or regional history from the perspective of a place's connections and interactions with other places and regions, and with the world at large – the glocal perspective. It breaks with historiography that looks at states, nations or regions as self-contained boxes but seeks out processes of mutual influences, entanglements and co-production.[102]

[101] An important moment in the conscious embracing of the discourse of global history in the historiography of international law was the publication of *The Oxford History of International Law*. Bardo Fassbender and Anne Peters, 'Introduction: towards a global history of international law' in Fassbender and Peters, *The Oxford Handbook of the History of International Law*, 1–24, at 8–11; James Belich, John Darwin and Chris Wickham, 'Introduction: the prospect of global history' in James Beich, John Darwin, Margret Frenz and Chris Wickham (eds.), *The Prospect of Global History* (Oxford: Oxford University Press 2016) 3–22; Jerry H. Bentley, 'The task of world history' in Jerry H. Bentley (ed.), *The Oxford Handbook of World History* (Oxford: Oxford University Press 2011); Lauren Benton, 'Law and world history' in Kenneth R. Curtis and Jerry H. Bentley (eds.), *Architects of World History. Researching the Global Past* (Hoboken, NJ: Wiley-Blackwell 2014) 134–58; Jan de Vries, 'Reflections on doing global history' in Maxine Berg (ed.), *Writing the History of the Global. Challenges for the 21st Century* (Oxford: Oxford University Press 2013) 32–47; Alexandra Kemmerer, 'Towards a global history of international law? Editor's note', *European Journal of International Law*, 25 (2014) 287–95; Erez Manela, 'International society as a historical subject', *Diplomatic History*, 44 (2020) 184–209; Patrick Manning, *Navigating World History. Historians Create a Global Past* (Basingstoke: Palgrave Macmillan 2003); Bruce Maslish and Ralph Buultjens (eds.), *Conceptualizing Global History* (Boulder, CO: Westview Press 1993); Patrick O'Brien, 'Historiographical traditions and modern imperatives for the restoration of global history', *Journal of Global History*, 1 (2006) 3–39; Jürgen Osterhammel, 'Global history in a national context: the case of Germany', *Global History*, 20 (2009) 40–58; Dominic Sachsenmaier, *Global Perspectives on Global History. Theories and Approaches in a Connected World* (Cambridge: Cambridge University Press 2011); Dominic Sachsenmaier, 'The evolution of world histories'; David Washbrook, 'Problems in global history' in Berg, *Writing the History of the Global*, 21–31.

[102] Conrad, *What Is Global History*, 6–14; on global legal history, see Thomas Duve, 'Global legal history: setting Europe in perspective' in Pihlajamäki, Dubber and Godfrey, *European Legal History*, 115–39; and Thomas Duve, 'What is global legal history?, *Comparative Legal History*, 8 (2020) 73–115.

The second focus is by far the one that is most pursued in general global history, as it is in international legal history. If there is one dominant theme coming out of the surge in the historiography of international law, it is the imperial encounter and the transregional interactions this generated. The vast majority of these studies in 'international law and empire' concentrate, logically, on the period from the late nineteenth century onwards. Relatively few studies have, since Alexandrowicz, questioned transregional encounters outside this period, or outside the context of relations between the West and the rest.[103] The first approach of global history, which studies the different 'provinces' of international law outside Europe and the West, has not been much applied for the period prior to the late nineteenth century, nor have relevant area studies often been included in mainstream historiography of international law. It is one of the particular purposes of *The Cambridge History of International Law* to try to fill this gap some more.[104]

The ambition that drove Lord Acton and the other makers of the mother of all Cambridge Histories to take a crucial step towards 'ultimate history' has long since been surrendered,[105] but some of the original ambition has remained for this publishing format in the sense of striving to be as comprehensive as possible. This is probably best understood, as Merry Wiesner-Hanks, the general editor of *The Cambridge World History* stated, as an attempt to catch, cover and advance the dynamics of the field as they are.[106]

The Cambridge History of International Law purports to make a contribution towards the globalisation of international law's historiography. This entails ambition, but also humility. The current boom in the historiography of international law has caused a rapid expansion of the field and a proliferation of subjects, geographies, chronologies, sources, themes, agencies, perspectives and methodologies. Any attempt at mapping and advancing these

[103] Lauren Benton, *Law and Colonial Cultures. Legal Regimes in World History 1400–1900* (Cambridge: Cambridge University Press 2002); Lauren Benton and Lisa Ford, *Rage for Order. The British Empire and the Origins of International Law 1800–1850* (Cambridge, MA and London: Harvard University Press 2016); Inge van Hulle, *Britain and International Law in West Africa. Empire and Legal Experimentation* (Oxford: Oxford University Press 2020).

[104] Recent attempts to map international law developments in the premodern, extra-European world include the part on 'Regions' in Fassbender and Peters, *The Oxford Handbook of the History of International Law*, 383–810; and Robert Kolb's rewriting of Preiser's study, *Esquisse d'un droit international public des anciennes cultures extra européennes* (Paris: Pedone 2010). On global history and the history of international law, see de la Rasilla, *International Law and History*, 152–82.

[105] Carr, *What Is History*, 1–2.

[106] Merry E. Wiesner-Hanks, 'Preface' in Christian, *The Cambridge World History*, vol. 1, xv–xx, at xv.

current trends cannot succeed by imposing a straitjacket over a collective endeavour such as this. In order to catch the essence of the field today – embracing pluralism – an open architecture is needed. There is today no consent about what writing the history of international law from a global perspective entails. It is not, nor can it be, the purpose of the current series to impose or even promote a singular vision on this matter. The design of the series is made to allow room for contributions towards a global history of international law along three main paths. While the classification below does not fully correspond to Conrad's, taking these three paths together may allow contributions to all three of his approaches to global history.

A first path towards advancing the agenda for global perspectives on the history of international law is to study the different experiences, systems and traditions of 'international law' from all parts of the globe and from all periods of history. Throughout human history, most experiences with the normative organisation of relations between polities (inter-polity law) or between subjects of different polities (trans-polity) law were primarily regional. One particular system, international law in the strict, historically contingent sense of the term, which emerged from the end of the nineteenth century onwards, claimed universal validity and gradually attained a global reach through the processes of imperialism, anti-imperial resistance, colonisation and decolonisation. Studies of various regional experiences of international law are often referred to as comparative history of international law, although they generally only entail the separate analysis of various systems on their own and rarely attain the level of actual comparison.[107] This is also the case for the present series, although its concluding volume may take the comparative exercise a step further.

Stringing different regional histories together into one series and assembling them all under the flag of 'history of international law' may be read as a suggestion that all these various experiences are part of a continuous development, even of the progressive unfolding, of an ideal international law. This is, however, not the intention behind the design of the series. It entails by and of itself nothing more than an acknowledgement that through human history different periods and regions have known different regulatory regimes for inter- and trans-polity relations. Problems of interaction between these different experiences, systems and traditions within and among regions and civilisations, of continuity, disruption and disappearance, of similarities and

[107] De la Rasilla, *International Law and History*, 153, 164–6.

differences, of convergence and divergence, are all treated as open questions to be explored in this series. As the quote by Wolfgang Preiser at the top of this chapter implies, the absence of a direct link between a phenomenon from the past and the present ought not to exclude the former from the purview of history writing. After all, its very inclusion in historiography will inevitably give it meaning in the present.

A second path entails focusing on the interactions and interfaces between different regional experiences of international law throughout the past. While such an approach has over recent years enjoyed quite some attention for bilateral 'encounters' between Europe and various other regions of the world for the period since the discoveries from the late fifteenth century onwards, and even more so for the nineteenth and twentieth centuries, there is still much ground to be covered for other transregional relations and periods. Using the lens of transregional relations or encounters also comes with its limitations and pitfalls. One should be careful not to reduce the issue to one of inter-systemic confrontations that are analysed in terms of the meeting of two monolithic and self-contained regional regimes. The exploration of transregional interactions should allow space to examine intra-regional differences, multiple and various agents, and flexible and constantly changing outcomes in the relative influence of these agents and their customs and laws in the co-productions of transregional regulatory regimes.[108]

The third path is to study the globalisation of international law as a historical process. As Thomas Duve pointed out, this is inextricably linked to addressing the mirroring question of the impact of international law on globalisation. Obviously, international law is an especially suitable field to apply this approach to global history writing since over the last century and a half a global regime of international law has emerged.[109] This does not, of course, preclude discussing historic instances of ideas and practices of global interaction and integration prior to this period.

The Cambridge History of International Law is designed to foster contributions towards a global history of international law along these three lines. The series' architecture is built on a range of choices, which will be explained in the following pages.

The first range of choices pertains to the concept and the epistemology of international law. The proposition to expand the historiography of international law from the direct antecedents of modern international law to all

[108] Duve, 'What is global legal history', 89–93, 110–3. [109] *Ibid*., 96–101.

major experiences, systems and traditions of international world history needs a generic, non-contingent reconceptualisation of the term. In his attempt to do so, Wolfgang Preiser stuck to the term 'state', but he did not define what he meant by it. While he did not restrict this to modern states which claim full and indivisible external sovereignty – independence – and internal sovereignty – exclusive jurisdiction over one's territory and population – he did set the co-existence of different mutually independent polities as a necessary condition for international law to emerge. Heinhard Steiger (1933–2019) retained this condition, but spoke about inter-power (*zwischen Mächten*) law.[110] The preferred English term as an alternative for state seems to be 'polity'. Whereas in origins it refers to the specific form of political organisation of the Greek *polis*, through the use of the term *politeia* by Aristotle (384–322 BCE) and its long intellectual tradition in political thought it gained a much wider and abstract meaning and is now used to denote any form of politically organised community.[111]

Writing global history of international law, however, forces us to extend the concept of international law further in two respects. First, it needs to cover relations between polities within imperial systems. Preiser largely excluded relations between non-independent or unequal polities from his purview. Imperial systems wherein different polities stand in some kind of hierarchical or unequal relationship thus fell off the board. This induced Preiser to erase the period of the Roman domination of the Mediterranean (168 BCE–400 CE) altogether from his narrative of international law.[112] Nevertheless, the Roman Empire did not prevent the legal regulation of international relations both without and within the imperial system through instruments and institutions which are typical of international relations, such as treaties, diplomacy or arbitration. A similar remark can be made about other imperial systems, such as those of China, the Ottomans or the Quechuas, just to name a few. An inclusive global history of international law should also discuss imperial systems wherein different polities were subject to the imperial power but at the same time held sufficient autonomy

[110] Heinhard Steiger, 'From the international law of Christianity to the international law of the world citizen: reflections on the formation of the epochs of international law', *Journal of the History of International Law*, 3 (2001) 180–93, at 180–1.

[111] Christopher Rowe, 'Aristotelian constitutions' in Christopher Rowe and Malcolm Schofield (eds.), *The Cambridge History of Greek and Roman Political Thought* (Cambridge: Cambridge University Press 2000) 366–89, at 384–6.

[112] Wolfgang Preiser, 'History of international law, ancient times to 1648' in Rüdiger Wolfrum and Anne Peters (eds.), *Max Planck Encyclopedia of International Law*, vol. 4 (Oxford: Oxford University Press 2012) 869–97, at 873–6.

for external political relations to exist and allow the use of similar legal instruments as in horizontal international systems. Although one can long and widely dispute whether these imperial systems formed systems of international law, they regulated the legal relations among polities and peoples and they contributed to the long-term development of inter-polity, trans-polity, transregional and global relations.[113] In this series, they will be treated as experiences, systems or traditions of international law.

Including imperial systems and relations constitutes a necessary step towards transcending the reductive epistemologies of modern international law. It rejects modern constitutional and international legal and political thought's insistence on the indivisibility of sovereignty,[114] and breaks the binary division of the legal outlook of the late nineteenth and the early twentieth centuries between international and colonial relations that stood at the heart of the West's imperialist design.[115] It chimes in with the wider trend in global history that acknowledges that empires have been a far more significant form of organisation and vector of regional and global relations than states.[116]

Second, global historiography of international law necessitates moving beyond the modern, Western distinction between public and private law. Under the modern paradigm of the nineteenth and twentieth centuries, international relations and international law were the preserve of one single type of polity, the sovereign state, to the exclusion of other forms of polity but also of individuals and associations of individuals. While at no time in history did this correspond to reality, it particularly distorts pre-nineteenth-century historical realities. It does so in three different ways.

Primo, it obscures the fact that at many times in history, 'international law' did not constitute an autonomous branch of the law. While this implies that there was no doctrinal development of international law as a separate set of rules and processes with its own literature and epistemology, the legal

[113] Adam Watson, *The Evolution of International Society* (London and New York: Routledge 1992).

[114] Benton, *Law and Colonial Cultures*; Lauren Benton, *A Search for Sovereignty. Law and Geography in European Empires 1400–1900* (Cambridge: Cambridge University Press 2010); Lauren Benton and Adam Clulow, 'Introduction: the long, strange history of protection' in Lauren Benton and Adam Clulow (eds.), *Protection and Empire. A Global History* (Cambridge: Cambridge University Press 2018) 1–9.

[115] Anghie, *Imperialism*, 1–12.

[116] Chris A. Bayly, *The Birth of the Modern World 1780–1914* (Malden, MA and Oxford: Blackwell 2004); John Darwin, *After Tamerlane. The Rise and Fall of Global Empires, 1400–2000* (New York: Bloomsbury 2008); Michael Geyer and Charles Bright, 'World history in a global age', *American Historical Review*, 100 (1995) 1034–60.

organisation of inter- and trans-polity relations may still have been quite sophisticated and complex. Often, rules and processes from what we would now label 'private law', which originated from the sphere of domestic relations between individuals, were directly applied to inter- and trans-polity relations. The *jus commune* from the European Late Middle Ages offers a prime example thereof.[117] Moreover, in most periods, the regulation of public relations between polities took inspiration from other regulatory fields, a reality which Martti Koskenniemi has recently exposed in his grand survey of European scholarship from the Late Middle Ages to the nineteenth century.[118]

Secundo, the focus on the public character of international law has led its historians to underestimate the significance of international law – even in its narrow understanding as the law between states – for individuals. In many periods and places throughout history, international law did create rights and obligations for individuals – e.g. through peace or trade treaties – which they could directly invoke or apply.[119] The nineteenth-century doctrines and practices of dualism versus monism and of diplomatic protection are not representative for most of history, and one may dispute whether they completely covered the realities of their own day and age.

Tertio, the modern autonomy of public international law has led us to neglect the agency of individuals and all kinds of groups and associations in international relations and law or to brush the impact of private (property and economic) interests in the formation of international law under the carpet. In modern terms, it has ostracised transnational private law as well as notions of common and universal private law from the narrative of international law's history.[120] For many historical periods, this cannot be done with justification, as the modern distinction, let alone separation, of public international law and universal/transnational private law did not exist. In many cases, individuals, groups and associations of various natures did play an important direct role in the practice of international relations as well as in the making and enforcement of the law. This pertained both to 'private'

[117] E.g. Dante Fedele, *The Medieval Foundations of International Law. Baldus de Ubaldis (1327–1400). Doctrine and Practice of the Ius Gentium* (Leiden and Boston: Brill/Nijhoff 2021); Karl-Heinz Ziegler, 'Die römische Grundlagen des europäischen Völkerrechts', *Ius Commune*, 4 (1972) 1–27.

[118] Koskenniemi, *To the Uttermost Parts of the Earth*, 4–12, speaks of 'bricolage'.

[119] Shavana Musa, *Victim Reparation under the Ius Post Bellum. An Historical and Normative Perspective* (Cambridge: Cambridge University Press 2019); Heinhard Steiger, 'Was haben die Untertanen vom Frieden?' in Heinz Duchhardt and Martin Espenhorst (eds.), *Utrecht–Rastatt–Baden 1712–1714. Ein europäisches Friedenswerk am Ende des Zeitalters Ludwigs XIV* (Göttingen: Vandenhoeck & Ruprecht 2013) 141–65.

[120] Patrick H. Glenn, *On Common Laws* (Oxford: Oxford University Press 2006).

matters such as trade and to aspects of international relations which under the modern paradigm are the preserve of polities – e.g. the role of private persons and companies in empire building, use of force and treaty making.[121]

In brief, the series is designed to break through the public/private divide and render a place for non-official agents and actors in the history of international law. In terms of international law's current terminology, it encompasses international (between polities) as well as transnational (between members of different polities) relations and laws.[122]

'International law' is obviously a historically contingent term and as such fails to catch the whole width and breadth of the series. The term 'international law' – or 'public international law' – came in vogue specifically to denote the law regulating the relations among sovereign states. It was for this purpose that its major coiner, Jeremy Bentham (1748–1832), suggested it as an alternative to 'law of nations', which he found too broad. According to him, 'law of nations' was used to denote interstate as well as common or universal private law, and natural as well as positive law.[123] Bentham was justified in this assessment. Law of nations, or rather the original Latin phrase *jus gentium*, has over its long history held different associations, often at the same time.[124] It is a terminological chameleon which, through its semantic changes, symbolises the many twists and turns that the legal regulation of inter- and trans-polity relations went through over two millennia of history. From that perspective, it would be the preferable term for this series. Nevertheless, it has not been selected for its title. To current international lawyers, the English version of *jus gentium*, 'law of nations', has lost its historical fluency as, over the twentieth century, it has almost become synonymous with public international law.[125] Moreover, to many it suffers from its associations with nation states as lawmaking authorities – 'law *of* nations' – and thus indicates the exclusion of tracks of transnational and common law.

[121] Martti Koskenniemi, 'Expanding histories of international law', *American Journal of Legal History*, 56 (2016) 104–12. E.g. Doreen Lustig, *Veiled Power. International Law and the Private Corporation* (Oxford: Oxford University Press); Philip J. Stern, *The Company-State. Corporate Sovereignty & the Early Modern Foundations of the British Empire in India* (Oxford: Oxford University Press 2011); Philip J. Stern, *Empire Incorporated. The Corporations That Built British Colonialism* (Cambridge, MA and London: Belknap Press 2023).

[122] Philipp C. Jessup promoted the term: *Transnational Law* (New Haven: Yale University Press 1956). See Rafael Domingo, *The New Global Law* (Cambridge: Cambridge University Press 2010) 35–44.

[123] Mark W. Janis, 'Jeremy Bentham and the fashioning of international law', *American Journal of International Law*, 78 (1984) 405–23.

[124] Lesaffer, 'Roman law'.

[125] Just like its variations in other major European languages: *droit des gens*, *Völkerrecht*, *derecho de gentes*, *diritto delle genti*, *volkenrecht*, etc.

Inter-polity law, a term Lauren Benton and Adam Clulow have suggested, is a good alternative.[126] 'Polity' (*politeia*) has a long tradition of use to refer to a wide range of forms of politically organised communities and is not – yet – tainted by its use in a specific context of the historiography of international law. However, the consideration that international law is today the most established term, also in the writing of generic histories of inter- and trans-polity law,[127] led to retaining 'international law' for the title of the series. Nevertheless, inter- and trans-polity law may also be used throughout.

Using the term 'international law' to cover the regulation of relations among polities throughout the ages and regions of the world is obviously and blatantly anachronistic. But then the mere use of the English language to speak about ancient Rome or medieval China is that as well. This pragmatic choice implies that, throughout the series, the term 'international law' holds two different meanings. It is used in the broad meaning to denote the great variety throughout the ages and different areas of the world of normative regulation, institution building and procedural standardisation of relations between and among a likewise great variety of polities. In this broad meaning, it is interchangeable with inter- and trans-polity law. In its strict, historically contingent meaning it refers to the particular regime of inter-polity law that was and is actually called international law by its contemporaries, that was the exclusive preserve of modern sovereign states, that emerged from the late nineteenth century onwards, that gradually achieved global application and that persists in some form to this day.

A second range of choices concerns the basic subdivision of the series in volumes and parts. For this, two layers of organisation have been chosen: a first layer on the basis of geographies, and a second on the basis of chronology or periodisation.[128] The architecture of the series rests on two

[126] Lauren Benton and Adam Clulow, 'Legal encounters and the origins of global law' in Jerry H. Bentley, Sanjay Subrahmanyam and Merry E. Wiesner-Hanks (eds.), *The Cambridge World History*, vol. 6, part 2 (Cambridge: Cambridge University Press 2015) 80–100, at 82, see also Lauren Benton, 'Interpolity law' in Mlada Bukovansky, Edward Keene, Christian Reus-Smit and Maja Spanu (eds.), *The Oxford Handbook of History and International Relations* (Oxford: Oxford University Press 2023) 320–33.

[127] E.g. David J. Bederman, *International Law in Antiquity* (Cambridge: Cambridge University Press 2001); Ignacio de la Rasilla and Ayesha Shahid (eds.), *International Law and Islam. Historical Explorations* (Leiden and Boston: Brill/Nijhoff 2019); Onuma, *International Law in a Transcivilizational World*.

[128] Oliver Diggelmann, 'The periodization of the history of international law' in Fassbender and Peters, *The Oxford Handbook of the History of International Law*, 997–1011; Ignacio de la Rasilla, 'The problem of periodization in the history of international law', *Law and History Review*, 37 (2019) 275–308; Heinhard Steiger, 'Probleme der Völkerrechtsgeschichte', *Der Staat*, 26 (1987) 103–26.

underlying assumptions. First, for most of history, different regional and subregional experiences, systems and traditions for the regulation of relations among polities and their subjects existed, of which the European was just one. Second, from the mid- to the late nineteenth century onwards, a particular system that pretended to its global application was forged: international law *stricto sensu*. In the process, existing regional systems disappeared or were marginalised, were subsumed into the global regime and/or evolved into regional variations.

With this, the old master narrative of European origins and global expansion is amended towards one of regional diversity and global international law. This is reflected by the architecture of the *corpus* of the series, Volumes II to XII. Volumes II to VIII cover different regional systems and traditions of international law prior to the rise of global international law. These include Eastern Asia, the Indian subcontinent, sub-Saharan Africa, pre-colonial America, Oceania, the ancient Middle East and Mediterranean, Christian Europe, the Islamic world and, finally, for the late eighteenth century and much of the nineteenth, the West in the meaning of Christian Europe and the Americas. Chronological subdivisions are flexibly applied to specific regions. The beginnings of global international law are situated in the final decades of the nineteenth century, when the model of the modern nation state achieved its classical form and could be found in all continents.

The series distinguishes between regional 'experiences', 'systems' and 'traditions'. Experiences are engagements with the regulation of inter- or trans-polity relations that did not solidify into a legal system. A system of international law is a more or less coherent body of law which developed through continuous, relatively intense relations between polities and their members in a certain period and region. A legal tradition encompasses several systems which may not necessarily have developed continuously or which co-existed in a given part of the world but shared the same foundational culture, institutions or ideas.[129] The different consecutive phases in the history of international relations in the ancient Near East between the third millennium and the conquest of the Persian Empire by the Macedonians in the fourth century BCE cannot be considered to constitute a single system, but they are part of a tradition wherein these systems influenced one

[129] Cf. H. Patrick Glenn, *Legal Traditions of the World* (5th edn, Oxford: Oxford University Press 2014).

another.[130] The same can be said about the Greek, Hellenistic and Roman systems which together form a tradition.[131]

The regional organisation of this series does not imply that regional experiences, systems and traditions are thought of as closed, self-contained boxes. Regions are considered as open spaces where practices of inter- and trans-polity relations occurred and where endogenous and exogenous agents and factors played together and co-produced international law. While regions, systems and traditions commonly had geographical cores – imperial or multipolar – their boundaries were ill-defined and permeable, and their geographies sometimes overlapped. Many volumes and parts of the series include specific chapters that cover transregional interactions, but discussions of these are not confined to these chapters. They may, at times, also be included in the thematic chapters that deal with specific functions of international law and thus mix endogenous and exogenous developments.[132]

With three volumes out of seven, the European and Western traditions are covered most extensively. Within the core structure of regional diversity and global international law this suggests that these traditions are considered to have most impact on the formation of modern, global international law. Such a claim is not without justification when applied to the historic roots of many current doctrines and institutions. The post-colonial critique does not deny that the West formed the major driver behind the formation of a global legal order between the late nineteenth century and the late twentieth but has unveiled this process as part of an imperialist strategy, which in turn transformed our understanding of the process. *The Cambridge History of International Law* is designed to continue and enrich the revision of the old master narrative and offer materials and ideas for alternative explorations. By offering the most extensive discussion so far of non-European international law and of transregional interactions – in particular outside the traditional scope of bilateral relations between Europe and various others[133] – it also aspires to aid discussion on the relative impact which agents, agendas, experiences and traditions from different regions had in the production of modern international law as a global system. This will be one of the key

[130] Amnon Altman, *Tracing the Earliest Recorded Concept of International Law. The Ancient Near East (2500–330 BCE)* (Leiden and Boston: Brill/Nijhoff 2012).

[131] Erich S. Gruen, *The Hellenistic World and the Coming of Rome* (Berkeley: University of California Press 1984).

[132] Tamar Herzog, *Frontiers of Possession. Spain and Portugal in Europe and the Americas* (Cambridge, MA and London: Harvard University Press 2015).

[133] For an extensive recent discussion of the Islamic tradition, see de la Rasilla and Shahid, *International Law and Islam*.

questions to be addressed in the concluding volume of the series. Moreover, the core structure of regional diversity and global international law does not exhaust the discussion of regional varieties after the end of the nineteenth century. The relevant Volumes IX to XII hold space for discussing regional variations and their interaction with the global and include separate chapters on these questions. Finally, the core structure does not entail any teleological urge, nor the claim that all these different regional developments make for one big, universal tradition of international law that draws all these together. It remains an open question what was drawn together, and what not. Global international law is as much a transitional system as any other. The twelfth volume, *International Law beyond the Cold War*, takes transition and open endings as its dominant perspective.

The third range of choices concerns the chapter structure of the series. The core of each volume and part is formed by returning 'thematic' chapters. In order to overcome the restrictive epistemology of modern international law and traditional history writing, the focus of the series is on the practices of relations between polities (inter-polity) and their agents and members (trans-polity). While the mere use of the English language causes a slide towards terminologies that are historically contingent on the conceptualisation and grammar of Western international law, moving the lens from doctrine to practice is thought an apt strategy to mitigate this.[134] The key is to define 'international law' first in terms of *what it did* at any given time or place – its functions – although this will often be disclosed in part through contemporary and later perceptions, knowledge and structured thoughts about *what it was*.[135] With the aim of bringing some form of common organisation to the series, five major functions which most systems and traditions of international law fulfilled throughout world history have been defined: (1) the division of space and resources; (2) making war and peace; (3) trade, movement and communications; (4) dispute settlement; (5) and diplomacy. In the different volumes and parts, with few exceptions, these themes return in the chapter structure, with the themes being split up according to the subdivisions and epistemologies of legal doctrines from that time. The growth and thematic proliferation of international law mean that the number of thematic chapters dramatically rises in the volumes and parts on the last two centuries. In addition to these thematic chapters and a general synthesis

[134] Benton and Clulow, 'Legal encounters'.
[135] Duve, 'What is global legal history', 110–13.

at the inception of each part or volume, there are chapters dealing with regional subsystems and inter- and transregional relations.

Finally, the practice-driven approach to international law begs the question of how the 'law' in international law – yet another category that has become tainted with the paradigm of state-based positivism – is to be understood. Thomas Duve has, in the context of discussions of legal pluralism, broken a lance for the term 'multi-normativity'. This would allow a broadening of the scope of discussion to non-legal normative rules and practices, such as rituals.[136] Such a terminological shift cannot, however, excuse us from addressing the question of what 'legal' and 'normative' mean, in terms of their relations as *species* and *genus*.[137] In the end, what is considered 'law' or 'normative' is contingent on time and place, and their shifting understandings are some of the major questions of legal history, and any social history, that the old master narrative of the historiography of international law has covered up, notwithstanding the efforts of the likes of Maine or Vinogradoff. Searching for the borderlines of the normative and the distinctions between law and other normative structures will be running through the different parts and volumes and, again, be expressly addressed in the concluding volume.

In his introduction to *The New Cambridge Modern History*, Sir George Clark (1890–1979) attempted to catch the shift away from objective history writing that had prevailed in the mind of Lord Acton by stating that historians now 'expect their work to be superseded again and again'.[138] The current, admittedly rather massive, collective undertaking is set up in this spirit of realism and humility. It is felt that, much as with its immediate predecessor, *The Oxford Handbook of the History of International Law* (2012), only a vast collective effort can do justice to the expansion, proliferation and pluralism of the field that followed the 'turn to history' of the 1990s and that this form is best suited to advance the agenda of the global historiography of international law. Only a good ten years after this previous grand collective effort, it seems legitimate to engage with another – roughly quadruple – exercise in organisational hubris, because of the dynamics, vibrancy and growth of the field in the intermediate years. The major difference with *The Oxford*

[136] Thomas Duve, 'Was ist "Multinormativität"? Einführende Bemerkungen', *Rechtsgeschichte*, 25 (2017) 88–101.

[137] Frederik Dhondt, 'Looking beyond the tip of the iceberg: diplomatic praxis and legal culture in the history of public international law', *Rechtskultur: Zeitschrift für europäische Rechtsgeschichte*, 3 (2013) 31–42.

[138] George Clark, 'General introduction' in G.R. Potter (ed.), *The New Cambridge Modern History*, vol. 1 (Cambridge: Cambridge University Press 1957), xvii–xxxvi, at xxiv.

Handbook is the more general extension to the period before 1500 and the significant, albeit probably not sufficiently significant, further growth of the space devoted to non-European international law. This allows into the narration of international law the inclusion of the work of many historians whose writings remain unknown to international lawyers. My ulterior hope for this series is that it will contribute to the advancement of the historiography of humanity's multiple efforts to overcome borders and all forms of tribalism by offering manifold ideas and insights for future historians to supersede, again and again and again.

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