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Histories of International law: Dealing with Eurocentrism

I

In *The Gentle Civilizer of Nations*, I suggested that international law began in the 1860's as part of liberal entrenchment in Europe as the clouds of nationalism, racism and socialism were rising in the political horizon. It began as a project of practical men, attorneys and lawyers active in politics and parliament, and not out of philosophical contemplation or system-construction. University professors were involved, but these were professors of something that was seen more as a craft than a science. What they aimed at was to »civilize« the behaviour of their nations, but also the colonies, and to do this by coordinating liberal legislative reform in Europe, by supporting formal empire in the colonies, and by doing all this as part of a set of cosmopolitan legal projects they grouped into their »international law« (*Droit international, diritto internazionale, Völkerrecht*).

The »men of 1873« as I came to call them, included the Belgian professor Ernest Nys (1851–1920) who eventually became the first historian of the new profession. Nys had taught legal history and jurisprudence at the *Université Libre de Bruxelles* from 1885 to 1898 and was thereupon appointed to professorship in international law at that same university. In the opening chapters of his *Le droit international, les principes, les théories, les faits*, Nys recounted the history of international law as part of the expansion of European civilization over the world. By 1904 there were forty-six States with full sovereign rights in the »international community« (22 European States, 21 American States, Japan, Liberia and the Independent State of the Congo). Nys accepted the division of that community into civilized, barbarian and savage peoples, but although he limited the circle of sovereigns to those inhabited by the first of these categories, he did not think the latter completely excluded from the benefits international law had to offer.

On the contrary, he read the Berlin Africa conference of 1884–85 as a powerful illustration of the will of the European powers to protect indigenous populations and to advance their material

condition and rights of freedom of conscience and religion.¹ With his colleagues Nys also engaged in long debates about the nature of »Oriental« cultures and about the conditions of their entry as full subjects of international law. In *L'état indépendant de Congo et le droit international* (1903) he vigorously defended the practices of his king, Léopold II of the Belgians, against the malevolent accusations he attributed to commercially motivated interests in Britain.²

In a work from 1893 Nys found the »origins of international law« in the European renaissance and saw »modern« international law crystallise with the Peace of Westphalia (1648), the symbol of the system of independent states (*Droit public de l'Europe*). Three great ideas had dominated history, he argued – progress, freedom and the »idea of humanity«.³ With »progress«, Nys meant European modernity as he saw it around himself – a non-confessional political order with advances in economics and technology. »Freedom«, at least judged by the story he had to tell, meant liberation from the universal pretensions of the Catholic Church and the Holy Roman Empire while the idea of »humanity« connoted the view of all human societies being linked in a universal community with expanding realization of the benefits of civilization. Nys began his account with Roman *jus gentium*, and the disputes between the papacy and the empire. »The programme of the future«, he wrote, was initiated in the 14th century by radical thinkers such as Marsilius of Padua and William of Ockham.⁴ International law grew up from Christian debates on the just war, and from inter-sovereign activities in commerce, arbitration, diplomacy, and the uses of the seas. Spanish scholastics were the first to articulate a law between independent communities and Grotius founded »the science of international law« by joining humanism and secularism with definite abandonment of universal empire.⁵ Nys confessed himself an admirer of England's liberties and »progress« that for him meant civilization, secularism, humanism and the universal freedom of trade. Together with the balance of power, these would form the basis of international order.⁶

Later historians have extended this narrative to the present. The long entries on the history of international law in the 1962 Strupp-Schlochauer *Wörterbuch* by Wolfgang Preisner, Ernst Reibstein and Ulrich Scheuner, for example, are structured so as to use the Peace of Westphalia as the definitive break between the ancient

1 E. NYS, *Le droit international, les principes, les théories, les faits*, 3 volumes, Brussels 1904–1906, 1912, Vol. I, 117–118, 126.

2 For these debates, see my *Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960*, Cambridge 2002, 11–178 and especially 155–166.

3 E. NYS, *Les origines du droit international*, Bruxelles 1893, 404–405.

4 »Les réformes qu'ils avaient rêvées furent menées à bonne fin; la société laïque se dégagait de plus en plus des chaînes dont l'Eglise avait voulu le charger; l'Etat moderne se constituait en dehors et au-dessus des confessions religieuses«, NYS, *Origines* (n. 3) 42.

5 NYS, *Origines* (n. 3) 10–12, 401–405.

6 NYS, *Origines* (n. 3) 164.

origins and the »time of European international law« (1648–1815).⁷ The 19th century then became that of the »widening of European international law«. ⁸ In this (standard) account, European hegemony was broken only in the 20th century with universal international institutions representing »Die Einheit der Völkerrechtsordnung«. ⁹ In the 1960s began the increasing specialization and diversification of the craft – the expansion of international law in different humanitarian, economic and technical fields, the period Wolfgang Friedmann memorably labelled that of »changing structure«. ¹⁰ All this, we now read, has led to a move from the political form of statehood into some kind of universal existence, perhaps »globalization«, perhaps, as Wilhelm Grewe put it in 2000, into an uncertain oscillation between »international community« and the hegemony of a single superpower. ¹¹

This familiar account of global modernity was first recounted among late-19th century European elites. Today we meet it at institutions of higher learning everywhere; its point is to inculcate in the members of the professional classes a certain manner of reflecting on the world and on one's historical place in it. Cultural markers such as »antiquity«, »the Renaissance« or »globalization« are as much part of it as are technical terms such as »cannon-shot rule«, »Concert of Europe«, or »humanitarian intervention«. Though all such notions bear the marks of their European origin, they enable lawyers from all over the world to communicate with each other by invoking widely shared historical associations and a normative teleology in which an idealized Europe, coded as nationhood, capitalism, »modernity« or »rule of law«, marks the horizon of its imagination. ¹²

These histories are profoundly Eurocentric. Europe is their geographical, political and conceptual centre. Münster and Osnabrück may be small German towns in today's North-Rhine Westphalia and Lower Saxony but whether the Peace of Westphalia for which they provided the location has the role traditionally attributed to it, or is simply a »myth«, ¹³ it remains central to the historiography of the field, crystallizing the view that when international law became »modern«, it also became a law of »states« that resembled those European communities that had consolidated themselves as »legal subjects« or »persons« distinct from their rulers on elite groups. The exact dating of the emergence of the idea of »sovereignty« that lifts the immaterial entity of the

7 W. PREISER, *Völkerrechtsgeschichte*, in: K. STRUPP, H.-J. SCHLOCHAUER, *Wörterbuch des Völkerrechts*. Dritter Band, Berlin 1962, 690a. For a very similar discussion, see e. g. A. WAGNER, *Geschichte des Völkerrechts*, Stuttgart 1936.

8 E. REIBSTEIN, *Zeit des europäischen Völkerrechts (1648–1815)*, in: STRUPP/SCHLOCHAUER, *Wörterbuch* (n. 7) 703.

9 U. SCHEUNER, *Neueste Entwicklung (seit 1914)*, in: STRUPP/SCHLOCHAUER, *Wörterbuch* (n. 7) 754.

10 W. Friedmann, *The Changing Structure of International Law*, London 1964. This development was also noted in SCHEUNER, *Neueste Entwicklung* (n. 9) 755–759.

11 W. G. GREWE, *The Epochs of International Law*, Berlin 2000, 703–706.

12 The view of an idealized Europe as the indispensable horizon of modern historical consciousness

is well presented in D. CHAKRABARTY, *Provincializing Europe. Postcolonial Thought and Historical Difference*, Princeton 2000.

13 For challenges to the centrality of »Westphalia«, see e. g. B. TESCHKE, *The Myth of 1648. Class, Geopolitics and the Making of Modern International Relations*, London 2003.

»State« into the position of a »moral entity« is a favourite topic of debate among historians. But whether »statehood« (and thus »modern international law«) emerged with North-Italian city states in the 13th century or among the nominalist contemplations among the »*moderni*« at the University of Paris in the 14th or 15th centuries, or whether one had to wait until the reaction to the religious wars in the 16th and 17th centuries, there is no quarrel about the place one has to look at.

The histories of *jus gentium*, natural law, and the law of nations, *Völkerrecht* and *Droit public de l'Europe* are situated in Europe; they adopt a European vocabulary of »progress« and »modernity«. Key distinctions in it between »political« and »economic«, »secular« and »religious« as well as »private« and »public« point to European experiences and conceptualizations. Even if postcolonialism has now become international law's official ethos, it still remains the case that »Europe rules as the silent referent of historical knowledge«. ¹⁴ This is true not only of the materials of the narrative but of the standards of historiography itself. What kind of history of international law would it be that made no reference to the »fall of the Roman empire« or to the rise of Protestantism, that examined colonization without the use of vocabularies of *dominium* or *jus gentium*? European stories, myths and metaphors continue to set the conditions for understanding international law's past as it does for outlining its futures.

II

Nys told the familiar story of Europe's expansion to world dominance. The non-European world appeared occasionally in the form of »infidel« Turks or the Saracens, enemies at war or trade partners to Christian Europe, sometimes as the enigmatic world of China that refused to yield its secrets to European diplomats. But all of them tended to fall into the indiscriminate mass of peoples the men of 1873 sweepingly called the »Orient«. They were not uncritical admirers of Europe's colonial past. As Protestant liberals, they had no difficulty in attacking religious or imperial justifications as appropriate standards for European overseas behaviour. With more or less hesitation, they adopted a vocabulary of »civilization« to capture the narrative of secularization and

¹⁴ CHAKRABARTY, *Provincializing Europe* (n. 12) 28.

state-formation within overall developmental assumptions about the modernity that they expected would enable them to assess, among other things, whether an Oriental nation might be capable of sharing in the benefits provided by what they only recently had ceased calling »European public law«. ¹⁵ In fact, soon after its establishment the *Institut de droit international* commenced a study on the matter. A questionnaire was sent to the members in which they were called upon to give their view as to whether the customs and beliefs in the West and the Orient – including the binding force of treaties – were sufficiently alike so that identical rules could be applied between them (and so that the systems of unequal treaties and consular jurisdiction could be dismantled). Nothing came of this project. The »Oriental« states were simply too different to allow for generalizations. ¹⁶

Although there was never any clear-cut standard of civilization, the *language of civilization* remained to mark out a difference that seemed palpable but that did not yield itself to a detailed articulation. It became a practical instrument for managing difference and satisfying oneself of the moral power of the law. Without clear substantive content, it allowed Europeans to make the distinctions they needed without having to explain too much. After the Great War, however, few lawyers persisted in using that language in the old way. After four years of indiscriminate slaughter of its young men, Europe turned inwards. International lawyers began blaming an exaggerated sense of »sovereignty«, national egoism, a loss of the sense of humanity in Europe as the culprit for the disaster. They now grasped at progressive social theories that pointed to some kind of world-wide community as the *telos* of human development. The normative standard earlier provided by »civilization«, was replaced by progressive sociology, »modernization« and economic and technological development. After the Second World War, these languages became increasingly professionalized, and from around 1960, started to be integrated into international law itself. With the diversification of international law's projects into free trade, third world development, human rights, environmental protection, and more recently into fighting against »impunity« and setting up international executive authority to »protect« vulnerable populations, international law found its way home in a universal teleology of progressive humanitarianism.

15 The classic is of course G. GONG, *The »Standard of Civilization« in International Society*, Oxford 1984.

16 KOSKENNIEMI, *Gentle Civilizer* (n. 2) 132–136.

III

European legal thought had always been intensely teleological. As natural law turned away from theology – the moment Nys identified as the »origin« – eschatology was replaced by the view of secular progress that led human societies from the »state of nature« to ever higher forms of civil co-existence and cooperation. The »anarchy« of the pre-statal situation would be left behind as civil communities would provide protection and welfare to their members, now described as the citizens of their communities. The idea a fully secular *salus populi* as the objective of government was first expressed by the Jesuit Francisco Suárez in early 17th century, but was adopted in Protestant natural law by Samuel Pufendorf and his 18th century followers. They also combined it with the providentialist view according to which an enlightened regard for one's own well-being would convince everyone of the necessity for commerce and interaction with others so that out of initial egoism, the greatest benefit for all would follow.¹⁷ With the demise of naturalism at the end of the 18th century, European teleologies began to express themselves in the languages of philosophy (Kant) and political economy (Smith).

Few essays have more importance in articulating the project of international law in Europe than Immanuel Kant's 1784 »Idea for a Universal History with a Cosmopolitan Purpose«. ¹⁸ That text is important not only because it sketches the future of humanity in terms of a »cosmopolitan existence« that Kant later was to suggest would emerge through the operation of (international) law, but owing to its nonchalant assumption that on the way to this goal Europe »will probably legislate eventually for all other continents«. ¹⁹ Because history's cosmopolitan end was a rational necessity, and law its privileged means, juristic training and practice were automatically embedded with a progressive ethos. What kind of international law would it be that had no *telos*? The ashes of natural law not only fed the growth of philosophy but also of political economy as privileged sites of teleological thinking. In his lectures on jurisprudence Adam Smith famously canvassed a four-stage progressive history of human societies that led from hunters and shepherds to agriculturalists and finally to commerce.²⁰ Smith and Kant identified the highest stage of humanity with the evolutionary ladder where they happened to find themselves.

17 See e.g. J. VINER, *The Role of Providence in the Social Order. An Essay in Intellectual History*, Princeton 1972, 27–28, 42–43.

18 See M. KOSKENNIEMI, *On the Idea and Practice for Universal History with a Cosmopolitan Purpose*, in: *Terror, Peace and Universalism. Essays on the Philosophy of Immanuel Kant*, ed. by B. PURI, H. SIEVERS, Oxford 2007, 122–148.

19 I. KANT, *Idea for a Universal History with a Cosmopolitan Purpose*, in: *Political Writings*, ed. by H. REISS, Cambridge 1991, 52.

20 For the content and influence of Smith's four-stages theory, see I. HONT, *Jealousy of Trade. International Competition and the Nation-State in Historical Perspective*, Cambridge, MA 2005, 101–103 and passim.

Evolutionary thinking followed international from its inception. Like Nys, Henry Sumner Maine was a professional historian whose brief period in the Whewell Chair in Cambridge was initiated in 1887 by an inaugural lecture where Maine discussed the history of international law in terms of the spread of Roman law all over Europe. »We may answer pretty confidently that its rapid advance to acceptance by civilised nations was a stage, though a very late stage, in the diffusion of Roman law over Europe«. ²¹ The result was a law of Christian nations:

»They form together a community of nations united by religion, manners, morals, humanity and science, and united also by the mutual advantage of commercial intercourse, by the habit of forming alliances and treaties with each other, of exchanging ambassadors, and of studying and recognising the same writers and systems of public law.« ²²

Like Smith, Maine shared the view that the history of human societies (or »progressive societies«) had developed through »stages« from less to increasingly more sophisticated forms, famously »from status to contract«. ²³ The »savages« of Africa and the »barbarians« of the Orient (to borrow James Lorimer's terminology) manifested forms of life that Europeans had long ago left behind. It was the task of legal history, Maine suggested, to examine these primitive forms so as to generalise from them about the universal laws of legal development. In this way, he was able to calm a European public that had become anxious about the experience of diversity that seemed suggested by the widening of its horizon. Cultural variations could now be explained as different stages in a single, uniform process. Order and hierarchy would be restored and Europeans would once again find themselves at the top. ²⁴

Until late-19th century, histories of international law were unthinkingly Eurocentric. Europe served as the origin, engine and *telos* of historical knowledge. In the 20th century, it became more difficult to articulate the normative goal of international law. In his 1908 review of the field, Lassa Oppenheim included in his call for a »positive science« of international law an exhortation for more history of the development of the (European) rules, that is to say of the growth of international law as a part of the Western civilization – a task as Matt Craven recently pointed out, »would be both celebratory and instructive«, providing a historical sense of Europe's world prominence as well as a tool for lawyers to operate

21 H. S. MAINE, *International Law. A Series of Lectures Delivered before the University of Cambridge 1887*, 2nd edition, London 1915, 16.

22 Maine, *International Law* (n. 21) 34.

23 H. S. MAINE, *Ancient Law*, New York 1968 [1861], 141

24 See J. W. BURROW, *Evolution and Society*, Cambridge 1966 and my *Gentle Civilizer* (n. 2) 74–76.

existing rules in a professional way.²⁵ Most 20th century reflection has followed upon this. Instead of being dressed as a project for »civilization« – indeed that 19th century word is routinely exorcised from the field – international law now appears as a modernising project, a state-building project, a project for economic and technological development, for human rights protection, for conserving natural resources and seeing to global security.²⁶ All of this now appears scientific, factual and functional, without any geographical or cultural bias at all. Histories of international law such as those by Scheuner, cited above, depict the 20th century in terms of turn away from Eurocentrism to universal institutions designed to carry out the technical and functional tasks called for by the management of a globally interdependent world. For example, the historical section at the beginning of Antonio Cassese's recent textbook notes while »international law rules and principles [of the 19th century] were the product of Western civilization and bore the imprint of Eurocentrism«, the »composition of the world community« has now changed radically. The Third World has been fully integrated law-making so that the most recent »developmental stage« can be characterised in terms of the emergence of special bodies (on trade, human rights, environment, development and so on) engaged in constant »interpenetration and cross-fertilization« so that, finally:

»... at least at the normative level the international community is becoming more integrated and – what is even more important – such values as human rights and the need to promote development are increasingly permeating various sectors of international law that previously seemed impervious to them«.²⁷

As political history, Cassese appears to suggest, the history of international law has come to an end. Only functional tasks remain to which international lawyers should now fully devote themselves. Another recent history agrees:

»le droit international d'aujourd'hui se voit attribuer les finalités nouvelles qui ne sont plus fondées sur le respect des intérêts des Etats mais reposent sur des valeurs communes aux hommes: l'environnement, la protection des droits de l'homme, le patrimoine commun de l'humanité, le développement durable ...«²⁸

After a few years of concern over international law's »fragmentation«, the sobering conclusion has been reached that by coordination among experts eventual clashes between functional

25 M. CRAVEN, Introduction: International Law and its Histories, in: *Time, History and International Law*, ed. by M. CRAVEN, M. FITZMAURICE, M. VOGIATZI, Leiden 2007, 1–2.

26 See TH. SKOUTERIS, *The Notion of Progress in International Law Discourse*, The Hague 2010.

27 A. CASSESE, *International Law*, 2nd edn., Oxford 2005, 45, 30.

28 M.-H. RENAUT, *Histoire du droit international public*, Paris 2007, 173.

regimes may be managed. Now Kant's cosmopolitan project has been articulated in the language of globalization – though there is no guarantee that Kant would have agreed.²⁹

This view remains as much a teleological narrative as any – it is a view that originates in Europe but is ubiquitous in today's international law and institutions. Commenting upon the allied occupation regime in Rhineland in the 1920's Carl Schmitt wrote that a nation is only then vanquished »when it allows foreign powers to determine what central constitutional concepts mean«. Schmitt had in mind such expressions as »status quo«, »intervention«, »peace« and »disarmament«. ³⁰ We may be dubious about the political direction of Schmitt's attacks but not about the conceptual theory of power he was putting forward. The narrative of international law that depicts progress in terms of a unified »international community« emerging from functional differentiation and technical professionalism speaks a thoroughly Eurocentric language. When international institutions delineate their jurisdiction through »human rights«, »free trade«, »fight against impunity«, »protecting the environment«, »advancing investment« or think of their activity in terms of »modernization«, »sustainable development«, »state-building«, »structural adjustment« or »responsibility to protect«, they subscribe to languages whose native speakers come from universities, think-tanks and civil society institutions in Europe and the United States. Viewing the shifts of vocabulary from the Spanish scholastics to »good governance«, the League of Nations' mandates system to the »war on terror«, Tony Anghie concluded that »whatever the contrasts and transitions *imperialism is constant.*« ³¹ In writing this, he was making the old point about Europe always imagining its values as universal and its knowledge and science as not only valid for itself but for all. Whatever generosity may be involved, the point is never only about good intentions. When Western speech becomes universal, its native speakers – the West – will be running the show. ³²

29 I rather doubt this. See my Constitutionalism as Mindset. Reflections on Kantian Themes about International Law and Globalization, in: Theoretical Inquiries in Law 8 (2007) 9–36.

30 C. SCHMITT, Die Rheinlande als Objekt internationaler Politik (1925), in: C. SCHMITT, Positionen und Begriffe im Kampf mit Weimar – Genf – Versailles, Berlin 1988.

31 A. ANGHIE, Imperialism, Sovereignty and the Making of International Law, Cambridge 2004, 315.

32 Out of the very wide literature on this point, see e.g. I. WALLERSTEIN, European Universalism. The Rhetoric of Power, New York 2006.

IV

There are two broad ideal-types of international legal history: »realist« narratives that concentrate on State power and geopolitics and view international law's past in terms of the succession of apologies for State behaviour and »idealist« histories that focus on lawyers and philosophers and view the past through debates about legal principles or institutions. As I have elsewhere shown in detail, neither of these is sustainable alone, without help from its counterpart.³³ They are best seen as presumptive positions or biases – the one foregrounding diplomacy, warfare and the act of conquest over which law would throw a veil of justification, the other privileging the development of laws, institutions and doctrines to which the world of diplomacy and State power only provide the background. In both, the non-European world has tended to appear as an object of European policy or thought about that policy. An example of the former »apologetic« strand of international legal history is Arthur Nussbaum's *Concise History of the Law of Nations* (second edition 1954) that is openly critical of telling international law's past as a history of its doctrines. Nussbaum wanted to concentrate on diplomacy and treaty relations as the solid (»realist«) basis for his legal history. Accordingly, he described the meeting of »west and east« by reference to consular and capitulation treaties. During the period 1648–1815 we encounter the Ottoman Empire and »countries outside Europe« in four pages devoted to their treaty relations with Europe.³⁴ Consular relations with Turkey, widening of international law to South America, »open door policy« in China and the ending of »Japanese seclusion« are addressed in Nussbaum's account of the 19th century.³⁵ But »[t]he widening of the Western law of nations to the Far East did not involve the fusion of European and Asiatic ideas. The European conception prevailed as to substance and form«. Though Nussbaum accepted that in the 19th century this law had become universal, he doubted if it had really »rooted in [non-European] minds«. ³⁶ Examining the present world (of the 1950s), Nussbaum viewed its most important aspect through the split between the Soviet Union and the West, a division, as he put it, between »serfdom [and] independence of nations«. ³⁷

Wilhelm Grewe's widely read 1984/2000 ultra-realist account of international law followed Carl Schmitt's *Nomos der Erde* by

33 M. KOSKENNIEMI, *From Apology to Utopia. The Structure of International Legal Argument*. Reissue with a New Epilogue, Cambridge 2005.

34 A. NUSSBAUM, *A Concise History of the Law of Nations*, 2nd ed. New York 1954, 51–60, 121–124.

35 NUSSBAUM, *Concise History* (n. 34) 194–196.

36 NUSSBAUM, *Concise History* (n. 34) 196.

37 NUSSBAUM, *Concise History* (n. 34) 290.

finding a natural place for the non-European world as object of European land-taking and colonisation.³⁸ The »foundation of the international legal community«, Grewe wrote, lay with the »occidental Christian community«. After the late Middle Ages, the voice of Christianity was seized by the succession of Spanish, French, British empires, the 20th century inter-war »Anglo-American condominium« and finally the »global community dominated by the West«. Grewe was as dismissive as Nussbaum of the »idealist« histories that committed a »methodologically questionable separation of theory and practice«. ³⁹ Grewe (and Schmitt) are ironically in broad agreement with postcolonial histories that have likewise read doctrinal writings (for example by the Spanish scholastics) as a soft glove over the imperial fist. They also agree on the centrality of colonialism as »one of the greatest problems of territorial order in the history of humanity«. ⁴⁰ Only Europeans were active in it: »the newly discovered continents were only an object of European political manoeuvring. They were not a self-reliant sphere of activity with its own centres of gravity.« ⁴¹ Nothing was said by Grewe about the African or Indian empires, the native communities in the Americas, Australia, New Zealand or the Chinese sphere. The British age of the 19th century witnessed »semi-admissions and partial recognitions« of some extra-European nations to the »international legal community« – by which was meant the community to which the originally European law of nations would apply. ⁴²

In the geopolitical histories of Grewe or Karl-Heinz Ziegler, ⁴³ history's moving force are large imperial centres that radiate their influence all over the world and thus determine the nature of the global legal order. From the »Spanish age« we move on to the »French age« and to the »British age« and then to the »American age«. In the present age, the most important struggles are waged between blocks seeking to arrogate to themselves the status of representative of the »international community« whose words determine what counts as »law«. Many kinds of critiques can be made against such histories. No empire is ever a homogenous entity but is always split against itself by uncertainty about where its interests lie and what should be done to realize them. Internal oppositions and sectional interests clash on the determination of imperial policy and imperial agents outside the metropolis tend to act unpredictably. The external world is no passive receptacle of

38 English translation GREWE, *Epochs* (n. 11); C. SCHMITT, *Der Nomos der Erde im Völkerrecht des Ius publicum europeum*, Berlin 1950.

39 GREWE, *Epochs* (n. 11) 2.

40 GREWE, *Epochs* (n. 11) 229.

41 GREWE, *Epochs* (n. 11) 295.

42 GREWE, *Epochs* (n. 11) 465.

43 K.-H. ZIEGLER, *Völkerrechtsgeschichte*, Munich 1994.

imperial influences but plays the centre's factions against each other using imperial favour or opposition to advance its agendas.⁴⁴ Also, realist history fails to account for the conflicting forces of knowledge and value that go to structure hegemonic »interests« as a more or less stable foundation for »policy«. It has no sense for the dependence of policy-making on underlying transnational social and economic structures.⁴⁵ The very proliferation of »realist« histories not only between Grewe and Nussbaum, but also between their type of Western realism and, for example, Marxian accounts of international legal history as the history of a commodity-form reacting to the development of capitalism testifies to their dependence on epistemic and political frameworks (»what in the past is significant, what is not, what is ›power‹, and who its identifiable agent?«) that are rarely discussed in them.⁴⁶ And finally, it is unclear to what extent such histories are histories of »law« in the first place – their tendency after all is to reduce normative languages to pale reflections of the forces of Realpolitik in a way that fails to account for the shifting uses of law between hegemonic and non-hegemonic actors and the anterior, power-conferring aspects of law. Law itself is never a single norm but it is the norm and the exception, the principle and the counter-principle, the justification and the critique of hegemonic interests: after all »a large number of Afro-Asians attaining independence during the post-Second World War period utilized international legal norms in their struggles for national liberation«. ⁴⁷ Such heterogeneous uses of international law fail to be captured in the realist radar-screen that only registers what State power or military might produce but rarely what it is that produces them.

Grewe was not oblivious of the way the international law's Eurocentrism had began to be questioned by the time he published the second German edition of his work (1984). The Polish-British legal historian C. H. Alexandrowicz had advanced the view that the relations between the Europeans and the Islamic and East Indian communities had in fact, until the 19th century, been based on a widespread network of reciprocal treaty relations and that it had not been until the 19th century when, owing to the rise of »positivism«, Europeans had began to impose their behavioural standards on others.⁴⁸ Alexandrowicz' work constituted a first opening for the treatment of non-Europeans as independent agents in international law, even as he, too, surveyed them through the

biases of realist historiography is given by a recent collective volume on neorealist approaches among the contributors of which we find such leading lights of the movement as Richard Rosenkrantz, Robert Keohane, Niall Ferguson and Paul Schroder. None of the 16 essays takes up colonialism or the third world. The obsession is with US power and any historical examination has meaning only if it illuminates problems or dilemmas in American foreign policy. See E. R. MAY, R. ROSENKRANTZ, Z. STEINER, *History and Neorealism*, Cambridge 2010.

- 47 Y. ONUMA, *A Transcivilizational Perspective on International Law* Leiden 2010, 349.
- 48 C. H. ALEXANDROWICZ, *An Introduction to the Law of Nations in the East Indies (16th, 17th and 18th centuries)*, Oxford 1967; IDEM, *Doctrinal Aspects of the Universality of the Law of Nations*, in: *British Year Book of International Law* 37 (1961), where he uses Georg Friedrich von Martens to illustrate the move from natural to positive law and the consequent need for non-European nations to see »the so-called admission or re-admission of extra-European nations« in the community of nations, 515.

44 I have made some of these critiques in *A History of International Legal Histories*, in: ANNE PETERS, BARDO FASSBENDER, *Encyclopedia of International Legal History* (Oxford University Press, forthcoming) and in a book review in: *Kritische Justiz* (2002) 277–281. For the tentative, porous and even contradictory operation of empire, see now LAUREN BENTON, *A Search for Sovereignty. Law and*

Geography in European Empires 1400–1900, Cambridge 2010.

45 For such points, see e.g. J. ROSENBERG, *The Empire of Civil Society*, London 1994; TESCHKE, *Myth* (n. 13).

46 For such an alternative realist account, see CH. MIÉVILLE, *Between Equal Rights. A Marxist Theory of International Law*, Leiden 2005, especially Ch. 3 and 6. A particularly striking illustration of the

lens of European concepts of (universal) natural law. But Grewe retorted that these contacts had not taken place within any idea of a universal legal system – the »true international legal community« remained that of Christian-European nations that may have entered into occasional relations with others but never envisaged this taking place under a single, neutral legal order. There was no symmetry, and through such links European law »gradually grew into a global legal order, the members of which were, it is true, only the ›civilized nations‹«. ⁴⁹

The realist frame operates behind the histories of many legal institutions of relevance to the non-European world. For example, the studies in the 1920s by Lindley and Goebel on the law of territory, though very useful and in some of their detail frankly irreplaceable, were written completely from the perspective of the law as an instrument of empire.⁵⁰ Goebel, for instance, described the law relating to colonial contacts in the Southern Atlantic through the prism of the law of occupation on non-European territory as extrapolated from the treaties Europeans had concluded to coordinate their activities. Even the »negro slave trade« was relevant only as part of the struggle for Atlantic trade in the 17th and 18th centuries.⁵¹ A completely different approach was taken by Jörg Fisch in his *Die europäische Expansion und das Völkerrecht* (1984).⁵² Instead of adopting the passive voice of the »growth« of a »system« Fisch, a student of Reinhardt Koselleck's, the father of *Begriffsgeschichte*, examined the rules on territory, trade, diplomacy and warfare in view of the hegemonic policies of European actors and by devoting sections to their direct relations with the non-Europeans. What Fisch presented, for the first time, was an extensive and nuanced account of the temporal and geographical variations of the colonial encounter. He also gave room to occasional reciprocity and varying hierarchies in which – for example in the Chinese sphere – Europeans sometimes found themselves in a subordinate position. Fisch also included in his account an over 200-page chronology of the »self-interpretations« by the Europeans of what they were doing – that is to say, a history of doctrines relating to the status of the overseas territories.⁵³ Against Schmitt and Grewe Fisch maintained that Europeans had never regarded the overseas territories as a »rechtsleeren Raum« or that the principle »no peace beyond the line« would have been generally applied by them.⁵⁴ The Europeans conceived their rules as univer-

49 GREWE, *Epochs* (n. 11) 466.

50 M. F. LINDLEY, *The Acquisition And Government Of Backward Territory In International Law: Being A Treatise On The Law And Practice Relating To Colonial Expansion*, London 1926; J. GOEBEL, *The Struggle For The Falkland Islands. A Study of Diplomatic History*, New Haven, Conn. 1927.

51 GOEBEL, *Struggle* (n. 50) 139, 120–173.

52 J. FISCH, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart*, Stuttgart 1984.

53 FISCH, *Die europäische Expansion* (n. 52) 153–380.

54 See e.g. the summary in FISCH, *Die europäische Expansion* (n. 52) 475–499.

sal, while answers to the question what kind of rights non-Europeans might enjoy thereunder varied between the two extremes.⁵⁵ Fisch also detected the persistence of colonial relations after the attainment of formal independence.⁵⁶ The result was a study that is still the most complete work on the now fashionable theme of »international law and empire«, though not widely read owing to the disappointing Anglo-centrism in international law today.

Geopolitically oriented histories reduce the law to a passive reflection of hegemonic policy and must therefore be supplemented by other kinds of study that account for the law's power-conferring and counter-hegemonic aspects as well as its »internal« ideological and intellectual developments. But these types of international legal history tend to be no less Eurocentric. Classical examples are Albert de Lapradelle's *Maîtres et doctrines* from 1950 that includes accounts only of the lives and writings of a few European men – jurists, diplomats, legal thinkers – and the Alsatian Robert Redslob's history of the four »great principles« of international law (binding force of treaties, the freedom of the State, equality and solidarity) that, he claims, have travelled through 2000 years of Western legal thought and policy.⁵⁷ A more recent work by Agnès Lejbowicz' (1999) also examined the intellectual history of international law in view of the persistent effort towards universality by limiting itself to discussing what European philosophers and lawyers have said about the matter. Although the work puts intersubjectivity in a culturally diverse world in its centre, no non-European voice can be heard to speak in it.⁵⁸ Such histories of cosmopolitan (legal) thought are often conceived as discussions of the Western philosophical tradition that is assumed to begin with the Stoics and to peak in Cicero, Grotius, Kant and Wilson. Redslob's *Grandes principes* is squarely within that tradition. The degree to which the tradition is more complex than may seem at the surface is illustrated, however, by Redslob's ready acceptance that the principles of his account may often have been used to further imperial interests and that the only solid basis for a territorial right was the existence of a de facto »power to command«.⁵⁹ No indigenous voice appears. The non-European was absent as an independent actor so that although the ideas of »solidarity« and »equality« were indeed »universal«, he found them expressed only by European thinkers (Grotius, Wolff, Vattel, Bentham, Kant ...) and relevant only for Europe.⁶⁰

55 FISCH, Die europäische Expansion (n. 52) 498–499.

56 FISCH, Die europäische Expansion (n. 52) 503.

57 A. G. DE LAPRADELLE, *Maîtres et doctrines du droit des gens*, 2nd ed. Paris 1950; R. REDSLOB, *Histoire des grands principes du droit des gens depuis l'antiquité jusqu'à la veille de la grande guerre*, Paris 1923.

58 A. LEJBOWICZ, *La philosophie du droit international. L'impossible capture de l'universalité*, Paris 1999.

59 REDSLOB, *Histoire des grands principes* (n. 57) 441.

60 REDSLOB, *Histoire des grands principes* (n. 57) 271–274, 290–297.

An additional problem in works such as Redlob or Lejbowicz is that it all seems as if it were possible to carry a timeless conversation on perennial problems between the living and the dead. Such classical »history of ideas« tends to view legal rules, principles or institutions either as travelling as it were unchanged through time or then as »developing« to their full maturity in the present. In both cases, they commit the sin of anachronism. But legal and political concepts are parts of the legal language of each period; their meaning cannot be grasped without a grasp of that language. This is why projecting an unchanging meaning for a notion (Redslob's »four principles«, Lejbowicz' dilemma of humanity and statehood) or seeing its earlier appearances as merely »undeveloped« uses of present concepts conveys no sense at all of what such notions may have meant to those who used them as part of their legal-political vocabularies at earlier moments in time. The meaning of a concept such as »sovereignty«, »*jus gentium*«, »property«, or indeed »law« is dependent on the context where it is used – especially on what one intends to use it *for* or what one tries to *achieve* through it.⁶¹ This is especially obvious for legal concepts that belong to polemical language-games in which we seek to support ourselves (or our friends) while attacking our adversaries. Of course, contextual historians (such as followers of Koselleck or Quentin Skinner) disagree about what the right context (language) is. Is it the academic context where the jurist lives or the political-economic or professional context where that person operates? Is it a context of books or guns, exchanges of language or exchanges of money?⁶² But such disagreements only highlight the larger point, namely that histories of international law come to us through the historian's own conceptual prejudices thus underlining the political and rhetorical aspects of legal history itself.

The recent international law history by Dominic Gaurier (2005) seeks to situate the »grandes figures« of the European canon in their temporal and doctrinal-thematic context. The encounter with the non-European world is included among one of the sub-items of the six »great themes« around which the book is structured. The 25-page discussion reviews the conditions of territorial occupation in the classical writers and discusses the treatment of American Indians in 19th century US Supreme Court practice. The section highlights the emergence of effective occupation and »agriculture« as bases of European title and the classics

61 See e. g. Q. SKINNER, *Meaning and Understanding in the History of Ideas*, in: *Visions of Politics. Regarding Method*, Cambridge 2002, 57–89.

62 See e. g. E. M. WOOD, *Citizens to Lords. A Social History of Western Political Thought from Antiquity to the Middle Ages*, London 2008, 4–11.

are presented (perhaps anachronistically) from the perspective of their treatment of native communities as »legal subjects«. ⁶³ The discussion of colonization is not situated in any general theory of European imperialism. But French jurists have also expressed interest in the Eurocentrism. A series of essays edited by Emmanuelle Jouannet and H el ene Ruiz-Fabri focuses specifically on imperialism, ⁶⁴ and a volume on the experience of the new generation of international lawyers takes up postcolonial themes. ⁶⁵ In her recent history of international law's liberal, welfarist ambitions, Jouannet also points to the self-evidence with which European writers treated the colonization of overseas territories. In Vattel's almost 900-page treatise, for example, only 5 pages were directed to the matter. »Europe«, she writes, »is above all interested in itself«. ⁶⁶ This applies today, too. Most French writing on the history of international legal thought (e. g. Jouannet's work on Vattel, Simone Goyard-Fabre's work on Pufendorf or pacifism, or Marc B elissa's work on the late-18th and early 19th century international law) is oriented towards classical themes of European political and legal theory. The role of law in French colonialism (for instance in North Africa) remains a neglected topic. An exception is the »school of Rennes« whose most important representative today is Monique Chemillier-Gendreau and whose *Humanit e et souverainet es* discusses the colonial implications not only of Western law but of Western legal rationality and includes a long section on the history of Western domination through »juridically organized exclusion«. ⁶⁷ The book asks the question of the conditions of emancipation in the colonial world and highlights the importance of economic autonomy but also of what she calls shared values. As an incident of left »*tiers-mondisme*«, the book celebrates third world self-determination and seeks to reinterpret legal categories – especially categories of economic law – in favour of the equitable and the fluid reason (»*raison floue*«) of the dispossessed. ⁶⁸ Likewise, Slim Laghmani's recent history of international law covering the period from Antiquity to the First World War consciously adopts an anti-imperial voice. ⁶⁹ Laghmani juxtaposes the Christian and Islamic views of the law of nations on just war and weaves his narrative around the intensification of Western domination. Europe and European jurists remain in the centre, however, and European geopolitics rules the world. But Laghmani's normative voice does stand out among the histories of international law.

63 D. GAURIER, *Histoire du droit international. Auteurs, doctrines et d veloppement de l'antiquit    l'aube de la p riode contemporaine*, Rennes 2005, 285–311.

64 *Le droit international et l'imp rialisme en Europe et en Am rique*, dir. par E. JOUANNET, H. RUIZ-FABRI, Paris 2007.

65 E. JOUANNET, H. RUIZ-FABRI, J.-M. SOREL, *Regards d'une g n -*

ration de juristes sur le droit international, Paris 2008.

66 E. JOUANNET, *Le droit international liberal-providence. Une histoire de droit international*, Brussels 2011, 97, 98.

67 M. CHEMILLIER-GENDREAU, *Humanit e et souverainet es. Essai sur la fonction du droit international*, Paris 1995, 153,

68 CHEMILLIER-GENDREAU, *Humanit e et souverainet es* (n. 67), especially 231–277.

69 S. LAGHMANI, *Histoire du droit des gens. Du jus gentium imperial au jus publicum europaeum*, Paris 2003.

V

Whether apologetic or utopian – focused on geopolitics or legal doctrines and concepts – historiographies of international law have been as Eurocentric as the world they describe. Among contemporary historians, there is no real doubt that, as Ian Hunter has put it:

»... far from being global, the law of nature and nations represented a Eurocentric normative order, as it had emerged to resolve an historically specific intra-European cultural and political problem: how to regulate war- and peace-making once the fracturing of Christianity – including its Thomistic metaphysics – and the emergence of territorial states had put an end to any lingering *respublica Christiana*.«⁷⁰

Here the writers and the doctrines are as much part of a »Eurocentric normative order« as the statesmen, diplomats and soldiers and the whole apparatus of ideas and power (and ideas/power) that sustains the political world. But from the realization that the histories of international law are Eurocentric, no direction is received as to how to deal with this state of affairs. Even radical Marxian or *tiers-mondist* voices critiquing the absence of a non-European perspective have tended to employ European concepts and categories to do this. The early postcolonial works by C.H. Alexandrowicz, R. P. Anand and T. O. Elias, for example, sought to correct the bias in the field by examining legal practices among Asian rulers and treaty relations between African communities even before the entry of the Europeans in those territories.⁷¹ But as Onuma has pointed out, to the extent that they have been written in the vein of »they, too, had an international law«, they ended up once again projecting European categories as universal.⁷² To argue that there was natural law in India, too, or diplomatic immunities in the Chinese realm, may – depending on the way the argument is laid out – finally turn out to support the universal nature of European categories or even its notorious standard of »civilization«, especially if the argument is supplemented by the claim that the Europeans themselves had failed to respect it – for instance that when accepting large Hinterland claims in Africa, Europeans failed to live up to the criteria of effective occupation. The claim of hypocrisy here serves to reinforce the power of a notion of European origin.

A subsequent generation of postcolonial critics have attacked the conceptual Eurocentrism embedded in such arguments. Anghie

70 I. HUNTER, »A Jus gentium for America«: Vattel in the Colonies, unpublished paper (2011). See also I. HUNTER, Global Justice and Regional Metaphysics. On the Critical History of the Law of Nature and Nations, in: S. DOR-

SETT, I. HUNTER, Law and Politics in British Colonial Thought: Transpositions of Empire, Basingstoke 2010, 13–20.

71 See ALEXANDROWICZ, An Introduction (n. 48); R. P. ANAND, Studies in International Law History: An Asian Perspective, Leiden 2004; IDEM, Maritime Practice in South-East Asia until 1600 and Modern Law of the Sea, in: R. P. ANAND, International Law and the

Developing Countries, Dordrecht 1987, 53–71; IDEM, Development of Modern International Law and India, Baden-Baden 2005; T. O. ELIAS, Africa and the Development of International Law, Leiden 1972.

72 ONUMA, A Transcivilizational Perspective (n. 47) 182; IDEM, When Was the Law of the International Society Born?, in: JHIL 2 (2000) 61.

and a group of scholars around him have argued that international law has from the outset operated as an instrument of European expansion. For these critics, international law is imperialist all the way down; it is »fundamentally animated by the civilizing mission that is an inherent aspect of imperial expansion which, from time immemorial, has presented itself as improving the lives of conquered peoples«.73 If that is so, then *any* use of its categories – even a critical use – will be Eurocentric and there is no reason for pride if past indigenous institutions have resembled European ones. Those are corrupt institutions, instruments of domination and illegitimate control. Instead, what one needed to do is to attack the concepts and practices at their root, and to show their nature or historical (and present) uses as instruments of colonial oppression. This would mean not to see the »rule of law« as an antidote to war and oppression but an *incident of them*, for example by following Marx and Miéville, and seeing in international law's formal equality the expression and ideological legitimation of a system of capitalist relationships that is structurally prevented from ever being a force for progressive change.74

But what is the nature of the universality that is being invoked as a basis for this critique of European colonization? Is it the case, as argued by Hunter recently, that Eurocentrism enters in from the back door, by offering an apparently universal and timeless norm for the postcolonial critics themselves?75 This is a large question whose treatment would require a critical assessment of the nature and role of the debates on universalism vs. particularism in contemporary Western academy that is impossible here.76 But I think the postcolonial critique ought not to be measured as part of an abstract philosophical or political theory debate at all. For it, the latter would seem to be »part of the problem«, namely limited to reiterations of the Western philosophical canon that end up in familiar dead-ends and finally in a dubious moral scepticism. What the critic seeks to articulate is the experience of a colonized people in the vocabulary of some power that illuminates that experience *regardless of what epistemological commitments that vocabulary might seem to entail if viewed by Western standards*. The critic, it seems to me, adopts the voice of European political theory/law, using it for effect while also turning it against itself. It is – or at least this is how I read it – occupying the famous Marxist thesis where the »validity« of a position lies not in whether it is »coherent« but

73 A. ANGHIE, On Critique and the Other, in: A. ORFORD, *International Law and its Others*, Cambridge 2008, 394.

74 MIÉVILLE, Between Equal Rights (n. 46) 98, 84–101 and Chapter 5 and 6. For the argument in a contemporary context, see B. S. CHIMNI, *International Institutions Today: An Imperial Global State in the Making*, in: *EJIL* 15 (2004) 1–37.

75 HUNTER, *Global Justice* (n. 71) 11–16.

76 I have dealt with the matter in my *International Law in Europe: Between Tradition and Renewal*, in: *EJIL* 16 (2005) 113–124.

whether it contributes to liberation. The important point in understanding the criticism is that it is not part of a context of a philosophical debate over the issue of universalism vs. relativism, but that it is instead making a polemical point about the »colonial origins of international law«. It seems clear to me that Anghie and others would have no hesitation to instrumentalise international law if only that might seem strategically useful – and there are moments, they would concede, when that has been the case.⁷⁷ In political judgment (as in contextual history), what would seem important is not so much the coherence of what is being said than what *act* is carried out by what is being said.

The difficult step to take after the postcolonial critique has done its work is what to do next. Clearly, it is necessary to begin to examine autochthonous legal vocabularies and dispute-resolution techniques. There has been increasing interest in the rules governing inter-community relations in the Islamic world and in the Chinese especially in the pages of *Journal of the History of International Law*.⁷⁸ The objective cannot be providing a »full picture« of the past, however. Most actors, contexts and events have been irredeemably lost and remaining fragments allow generalization only with the greatest difficulty. The dangers of anachronism and conceptual imperialism are constantly present. As Steiger asks laconically, how much common ground is there really with what we know as »international law« and a document from the past in which a party refers to itself as the »sun« to the others?⁷⁹ What is the definition of »law« employed in such discussions? Do these histories open up a perspective for a global law of humankind – or do they rather point to the irreducible heterogeneity of the human experience? Onuma is right when he suggests that it is in the nature of something like a »civilization« to produce a universal view of everything. Awareness of what I have elsewhere addressed as a combination of solipsism and imperialism is quite important in understanding the way knowledges operate to create communities of power claiming a universal (objective, scientific) view of the world. This applies to knowledges labelling themselves »comparative« or »transcivilizational«, too, of course. There is no meta-level that would not be part of some universalization project and free from the tendency of producing yet another set of asymmetrical counterconceptions on the heels of Greek/barbarian, Christian/heathen or human/non-human that tend to prepare the way for

77 See B. RAJAGOPAL, *International Law from Below. Development, Social Movements and Third World Resistance*, Cambridge 2003.

78 Out of burgeoning literature, see e.g. A. AFSAH, *Contested Universalities in International law. Islam's Struggle with Modernity*, in: *JHIL* 10 (2008) 259–320.

79 H. STEIGER, *From the International law of Christianity to the*

International law of World Citizen, in: *JHIL* 3 (2001) 181.

aggression on their underprivileged part.⁸⁰ This is not to oppose the writing of non-European histories, merely to guard against excessive ambition. Histories of non-European worlds are needed to illuminate the diversity of human experience and to create critical distance towards the intuitive naturalness of stories we have learned. So far, the attention of postcolonial critics has been perhaps more on the critique of European practices than on examining alternative institutions or vocabularies, with the exception of Islamic warfare or the Chinese tribute system. In writing these histories, both in the vein of critique and construction, one cannot, however, be ignorant of the fact that much of the ground is delineated by European concepts and techniques, periodizations and standards. One cannot write by stepping outside the professional vocabulary in which these stories are told and learned – but it is not impossible to put those stories into new uses to demonstrate their fluidity and incoherence and to destabilize the political and teleological normativities that go with them. Let me end this rapid overview with a sketch of four directions to deal with Eurocentrism in the history of international law.

A first direction was inaugurated by Anghie himself. This consists of the careful demonstration of the colonial origins of an international legal rule or institution. This could be, for example, a discussion of the way the laws of war always allowed brutal forms of colonial warfare that would have been prohibited in European wars, because »[t]ribal warriors are ... either too cruel or too imbecile or both to be able to respect the laws of war«.⁸¹ Here as elsewhere the flexibility of »civilization« allowed exclusion or inclusion, as seemed called for.⁸² Much of the work on the history of the law of development has been inspired by the objective to show how it has imposed Eurocentric ideas about modernity and technical standards of »rule of law« and enforcement of contract so as to maintain a situation of social and economic inequality. The »inner logic of economic growth and technological advance« according to Beard, turned a large part of the world into an »underdeveloped« terrain whose populations were to be rapidly »incorporated« by enacting law for the protection of foreign investors.⁸³ In a similar vein, Anne Orford has discussed humanitarian intervention and the »responsibility to protect« in view of classical political theory that creates a nexus between protection and obedience. This, she argues, informed the theory of interna-

80 See R. KOSELLECK, *The Historical-Political Semantics of Asymmetric Counterconceptions*, in: *Futures Past. On the Semantics of Historical Time*, New York 2004, 155–191.

81 F. MÉGRET, *From ›Savages‹ to ›Unlawful Combatants‹: a Postcolonial Look at International Humanitarian Law's ›Other‹*, in: ORFORD, *International Law and Its Others* (n. 73) 293.

82 KOSKENNIEMI, *Gentle Civilizer* (n. 2) 127–132.

83 J. BEARD, *The Political Economy of Desire. International Law, Development and the Nation State*, London 2007, 159–160, 168–169. See further, S. PAHUJA, *Decolonizing International Law. Development, Economic Growth and the Politics of Universality*, Cambridge 2011.

- 84 For a wonderful reading of expansion of international executive authority in this direction, see A. ORFORD, *International Authority and the Responsibility to Protect*, Cambridge 2011.
- 85 M. MAZOWER, *No Enchanted Palace. The End of Empire and the Ideological Origins of the United Nations*, Princeton 2009.
- 86 N. BERMAN, *L'affaire des décrets de nationalité*, in: *Passions et ambivalences. Le colonialisme, le nationalisme et le droit international*, Paris 2008, 279–316.
- 87 Regarding the Spanish empire, the works by Luciano Pereña remain largely unknown outside Spain. Though not completely free of imperial apologetics, they, as well as the 29 volumes of the *Corpus Hispanorum de Pace* (CHP), edited by Pereña, are an invaluable (though again, little known) source of materials. For Pereña's own summary, see L. PEREÑA, *La idea de justicia en la conquista de América*, Madrid 1992.
- 88 The question of legal title and legal justification is central in e.g. C. SYLVEST, 'Our Passion for Legality': International Law and Imperialism in Late Nineteenth-Century Britain, in: *Review of International Studies* (2008) 403–423; D. ARMITAGE, *The Ideological Origin of the British Empire*, Cambridge 2000; K. MACMILLAN, *Sovereignty and Possession in the English New World. The Legal Foundations of Empire 1576–1640*, Cambridge 2006; and *Victorian Visions of Global Order. Empire and International Relations in Nineteenth-Century Political Thought*, ed. by D. BELL, Cambridge 2007. Special attention to the legal articulation of the settler-indigenous relationship is given in R. A. WILLIAMS, *The American Indian in Western Legal Thought. The Discourses of Conquest*, Oxford 1990; P. MCHUGH,

tional executive authority by Dag Hammarskjöld in the 1950s and now remains the best frame for understanding the asymmetries of recent UN operations in the Third World.⁸⁴ These studies have highlighted the way colonial domination may operate in the shadow of »internationalization« and through the instrumentality of international organizations – something discussed also in the recent work by Mark Mazower.⁸⁵ Dissecting the *Nationality Decrees* case (1923), Nathaniel Berman has produced a nuanced reading of how colonial agendas may be pushed alternatively by advocating a wide jurisdiction for international bodies or by opting for a more closely guarded domestic jurisdiction, thus pointing to the political ambivalence of the international/national divide at the heart of the discipline: both sides may have »imperial« consequences.⁸⁶

Another way of dealing with Eurocentrism is by focusing on the encounter between Europe and the new world as an important, even foundational moment to the discipline itself. This could take place by laying out the rules and the practices and by recounting the facts – the making of the first treaties, for example, building of the settlements or entrepôts, the endless warfare with the »natives«, efforts at evangelization and so on. Even as it seems unbelievable, no general works on the international law aspects of the colonial encounter exist beyond the above-mentioned Fisch book. A favourite topic remains discussing the Spanish theologians' positions in respect of the conquest and settlement of Indian territory.⁸⁷ But there is today growing literature on the legal aspects of the creation of British colonial system and especially of the varying ways in which the relations between the settlers and the indigenous population were conceived.⁸⁸ A thorough recent review of Anglo-French relations in North America and Canada adds to existing work by pointing out how the native communities were originally treated as independent nations although under many treaty-based restrictions on their liberty of action.⁸⁹ For the legal aspects of the encounter, the best, somewhat under-appreciated introductory work is that by L. C. Green and Olive P. Dickason.⁹⁰ Studies under this theme often focus on the way international law was used to treat the »barbarians« or »die Wilden«.⁹¹ This might be done in the venerated fashion of the *Leyenda negra* to shock the reader into an anticolonial consciousness, but equally well simply to distinguish between different moments and locations of the colonial encounter and to bring out the varying instrumental nature of the law that

Aboriginal Societies and the Common law: A History of Sovereignty, Status and Land, Oxford 2004; S. BANNER, *How the Indians Lost their Land. Law and Power on the Frontier*, Cambridge, MA 2005; and *Law and Politics* (n. 75).

- 89 M. MORIN, *Des nations libres sans territoire? Les autochtones et la colonisation de l'Amérique française du XVIIe au XVIIIe siècle*, in: *JHIL* 12 (2010) 1–70.

90 L. C. GREEN, O. P. DICKASON, *Law of Nations and the New World*, Edmonton 1993.

- 91 The classic here is A. PAGDEN, *The Fall of Natural Man: the American Indian and the origins of comparative anthropology*, Cambridge 1983. For international law aspects, see e.g. D. DÖRR, *Die »Wilden« und das Völkerrecht*, in: *Verfassung und Recht in Übersee* 24 (1991) 372–392.

tended to follow the convenience of the Europeans. Or they might focus on the innumerable ways that Europeans failed to understand – often to their own disadvantage – the cultures they came to contact with.⁹² Yet another theme under this strategy would be to analyse the shifts between formal and informal relations through which European domination was created and ensured: it would seem very important for example to integrate formal annexation of non-European territories («colonialism») with the expansion of European-originated private law rules over contracts and property and the use of »cat’s paw« techniques with native allies to carry out dispossession or establish informal domination.⁹³

Eurocentrism might be dealt with also by directing attention to the hybridization of the legal concepts as they travel from the colonial metropolis to the colonies and their changing uses in the hands of the colonized. This approach might, for example, examine particular colonial actors – jurists, politicians, resistance fighters – using European concepts but turning them to support of a particular indigenous project or preference. A good example would be Nathaniel Berman’s discussion of the debates between the French colonial and anti-colonial intelligentsias during the War of the Riff (1925), instrumentalised by the charismatic rebel leader Abd el-Krim for his anti-colonial purposes.⁹⁴ Or it might focus on Latin American Creole elites’ use of international law in order to support their local hegemony both vis-à-vis Europeans as well as the more »backward« inhabitants of those territories.⁹⁵ Or it might show the ways in which Latin American international law textbooks have adapted the universal vocabulary of European writings into a »professional style uniquely Latin American«, thus supporting not the passive assimilation of the region to Europe, but its asserted distinctiveness from it.⁹⁶ Such studies complicate the homogeneous idea of Europeanization by undermining the view that the surface adoption of a European legal vocabulary would always or necessarily produce similar consequences, indeed that it would necessarily operate in the favour of »Europe«. And it would highlight the heterogeneity of the non-European world and vest non-European subjects with an agency of their own thus operating as a counterpoint to the pervasive European habit of treating the outside world as a homogeneous »Orient« as well as to the indigenous ideology that views decolonization in terms of a return to a mythical pre-colonial authenticity.⁹⁷

92 See e.g. T. RUSKOLA, *Canton Is Not Boston: The Invention of American Imperial Sovereignty*, in: *American Quarterly* 57 (2005) 859.

93 See e.g. J. T. GATHII, *Imperialism, Colonialism and International Law*, in: *Buffalo Law Review* 54 (2007) 1013–1066; M. KOSKENNIEMI, *International Law and Empire: The Real Spanish Contribution*, in: *University of Toronto Law Journal* 67 (2011) 1–36.

94 N. BERMAN, »The Appeals of the Orient.« *Colonized Desire and the War of the Riff*, in: *Gender and Human Rights*, ed. by K. KNOP, Oxford 2004, 195–230.

95 L. OBREGÓN, *Completing Civilization: Creole Consciousness and International Law in Nineteenth-Century Latin America*, in: *Or-*

ford, *International Law and its Others* (n. 73) 247–264.

96 A. BECKER LORCA, *International Law in Latin America or Latin American International Law? Rise, Fall and Retrieval of a Tradition of Legal Thinking and Political Imagination*, in: *Harvard International Law Journal* 47 (2007) 289–290 and generally 283–305. Adopting the narrative that international law was created by the encounter with the »Indies« might even offer Latin American authors with a privileged disciplinary voice, 291.

97 For a theorization and discussion of »hybridity« in the Egyptian context, see A. SHALAKANY, *Sanhuri and the Historical Origins of Comparative Law in the Arab World (or How Sometimes Losing your Asalah can be Good for You)*, in: *Rethinking the Masters of Comparative Law*, ed. by A. RILES, Oxford 2001, 152–188.

A variant of such a »hybrid« view would show the effects of the colonial encounter on the empire itself. To what extent European laws, or perhaps the identity of »Europe«, are a result of colonialism? Might it be the case that by being obsessed by its »other« Europe might end up defining its identity – its »civilization«, »modernity« or »development« – by that other, in a subtle master/slave dialectic? In this vein, Nathaniel Berman has pointed to »imperial ambivalence« as quite central to the construction of liberal internationalism, and thus of a certain kind of metropolitan modernity itself. The oscillation between the condemnation of the »bad« imperialism by others and the celebration of the good policies of »trusteeship« or »protection« one is carrying out oneself appears, for Berman, as a historical constant in the self-constitution of forms of Western political consciousness.⁹⁸

Yet another, fourth, technique is to exoticize (provincialize) Europe and European laws. In the *Gentle Civilizer*, I tried to give close »anthropological« attention to the contexts in which international law emerged as a cultural sensibility among a class of late-19th century European liberal and Protestant professionals. Instead of depicting it as part of some universal metaphysic I described international law as a platform or a vocabulary for the political project of a small group of activist lawyers, hoping to make it appear as a narrow – indeed »exotic« – aspect of fin de siècle European culture. Such genealogies may operate to pinpoint the »particular« that is hidden by the discipline's universal voice. This is the point of the recent studies that have interpreted early modern writers such as Grotius or Locke from the perspective of their activity as legal counsel for the Dutch East India Company or investor with the Royal Africa Company.⁹⁹ Showing the close connection between the doctrines of the freedom of the seas and Dutch or British maritime and colonial interests in the 17th century operates to contextualize the relevant rules and although it does not in any way »de-legitimize« those rules, it makes visible the relations of power they entail. The same applies to accounts of the mandates system in the League of Nations or the idea of international executive authority within the UN that read them as reactions to the collapse of old forms of imperial rule and as efforts to maintain some way to exercise control on former colonies.¹⁰⁰ Again, the point is to make that which presents itself as timeless and universal as contextually bound to particular projects or

98 N. BERMAN, Les ambivalences impériales, in: *Passions et ambivalences* (n. 86) 425–476.

99 For Grotius, see M. VAN ITTERSUM, *Profit and Principle. Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies*, Leiden 2006. See also E. WILSON, *Savage Republic. De Indis of Hugo Grotius, Republicanism and Dutch Hegemony within the Early Modern World-*

System, Leiden 2008; for Locke, see B. ARNELL, *John Locke and America. The Defence of English Colonialism*, Oxford 1996.

100 See ORFORD, *International Authority* (n. 84).

interests. Eurocentrism might then be destabilized with the realization that »Europe«, too, is just a continent with its particular interests and neuroses, wisdom and stupidity – rather like realizing that the choice for a French restaurant is also to opt for ethnic food.

A final point needs to be made. A standard way to deal with Eurocentrism, has been to ask the question of whether non-Europeans were either »included in« or »excluded from« the system of international law. The question is based on the (Eurocentric) assumption that being included is good (because international law is »good«) whereas exclusion needs to be condemned. But this cannot be right: the key question is not whether somebody is included or excluded but what »inclusion« and »exclusion« mean. Among the merits of Anghie's classic postcolonial analysis of imperialism and international law is the way inclusion by the Spanish Dominican theologians of the 16th century (Vitoria in particular) of the American Indians in the Christian system of natural law and *jus gentium* is shown to operate as a means to discipline the Indians and establish authority over them.¹⁰¹ It seems rather pointless to engage in a controversy about the morality of Vitoria, the man, and important instead to stress the ambivalence of his options. Then as now, it all depends. The meaning and status of an encounter cannot be determined in abstraction from its meaning to its participants – and these cannot be known independently of recourse to assumptions about what they »must have thought« – that is, what seems »right« to *us*. The four techniques above try to avoid taking the meaning of any encounter as a given and look instead for interpretative imagination and the agency of all concerned. »Europeanization« is a complex phenomenon that may serve different agendas at different moments. It remains important for post-Eurocentric research in the history of international law that the mere employment of a particular vocabulary (of »intervention«, »natural law«, »positivism«, »Christianity«, or »jihad«) does not alone tell us how we should assess the relations of power addressed by it. Different actors will use it for different purposes and everything will depend on the context (the definition of which may, again, be a subject of dispute). For example, the application of formal sovereignty and UN membership in the colonies since the 1960s has done little to abolish factual inequality in the world, but it may have made that inequality slightly more invisible and thus slightly less politically

101 A. ANGHIE, *Imperialism, Sovereignty and the Making of International Law*, Cambridge 2004.

vulnerable. But what it has done is a matter of research and not the application of dogma.

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And what should be expected of following such avenues? They do not lead to a fully objective, true account of the past »wie es eigentlich gewesen [sei]«. There is no point from which to view history that would not be a particular standpoint. Instead, the above discussion has tried to point to the power and weakness of reigning narratives about international law's past and to encourage adding perspectives to provide a more complex and more credible assessment. Narrative vocabularies are, to use Paul de Man's familiar image, mechanisms of blindness and insight. A shift of vocabulary enables us to see things that were previously hidden but they also inevitably throw something in the dark. The point is not to write »global history« in which everything is visible – an impossible undertaking – but to diminish the power of blindness, not for antiquarian interest in detail but so as to see more clearly into the future.

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